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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 315

THE WESTERN UNION TELEGRAPH COMPANY
AND CHARLES H. FRAKE,
Appellants,

vs.

STATE OF NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

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No. 315

THE WESTERN UNION TELEGRAPH COMPANY AND CHARLES H. FRAKE,

Appellants,

vs.

STATE OF NEW JERSEY,

Appellee

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of New Jersey entered against them.

Opinions Below

The opinion of the Supreme Court of New Jersey is reported (but not yet in print) in 12 N. J. 468, 97 Atl. 2d 480, and a copy is attached hereto as Appendix A. A prior opinion of the trial court ruling on motions to dismiss the indictment concerned on this appeal and four other indictments, rendered April 2, 1951, is reported in 13 N. J. Super. 172, 80 Atl. 2d 342.

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Jurisdiction

The judgment of the Supreme Court of New Jersey was entered in the Office of the Clerk of that Court on June 1, 1953. A Petition for Appeal is presented to a Justice of the Supreme Court of the United States herewith, to-wit, on July 28, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 United States Code, Section 1257, Subdivision (2), in that appellants have drawn in question the validity of a statute of the State of New Jersey (R. S. 2:103-1) on the ground of its being repugnant to the Constitution of the United States (the Due Process provision of the Fourteenth Amendment and the Commerce Clause, Article 1, Section 8, Clause 3), and the decision of the Supreme Court of New Jersey was in favor of its validity.

Questions Presented

Whether the legislative enactment of the State of New Jersey embodied in R.S. 2:103-1 which perpetuates the New Jersey concept of the common law disorderly house, as applied against the Telegraph Company (and against the manager of its office at Bridgeton, New Jersey) in its status as a public service corporation and common carrier of written communications by telegraph, regulated by both the Federal and State statutes, in an indictment which charges a violation of said statute, but with particular reference to money orders relating to wagers, is void for vagueness within the Due Process clause of the Fourteenth Amendment, and

Whether it constitutes a burden on interstate commerce within Article 1, Section 8, Clause 3.

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Statute Involved

The statute, R.S. 2:103-1 provides as follows:

> "Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not expressly provided for by statute, shall be misdemeanors."

The Indictment Below

The indictment, upon which were based the judgments of conviction in the lower court which have been affirmed by the Supreme Court of New Jersey in the judgment from which this appeal is taken, was handed up by the Grand Jury of Cumberland County, New Jersey, on June 5, 1950, and was the subject of formal amendment, by order of the County Court of Cumberland County (to which it had been referred by the Superior Court entered March 12, 1951). The indictment No. 5012 as amended (the amendments being indicated by the underlining or italics which have been supplied) was as follows:

> "The Western Union Telegraph Company, *a corporation,* and Charles H. Frake, on the twenty-second day of June, in the year of our Lord, one thousand nine hundred and forty-eight and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the City of Bridgeton, in the County of Cumberland aforesaid, and within the jurisdiction of this Court, wilfully, knowingly and unlawfully did keep and maintain at the premises commonly known and designated as 82 East Commerce Street, a certain common ill-governed and disorderly house; and in the said house, for their own lucre and gain, certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and on the said other days and times there unlawfully and willingly did cause and procure to fre-

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quent and come together, and the said men and women, in the said house of them, The Western Union Telegraph Company, *a corporation*, and Charles H. Frake, at unlawful times in the day, then and on said other days, and times, there to be and remain, betting, bookmaking and gambling and misbehaving themselves, and unlawfully and willfully did permit and yet do permit, to the great damage and common nuisance of all the citizens of the State of New Jersey, there inhabiting, being, residing, and passing, to the evil example of all others in the like case, offending, contrary to the form of the revised statute 2:103-1, and against the peace of this State, the government and dignity of the same."

Statement

Appellant The Western Union Telegraph Company is engaged in the interstate and intrastate (and foreign) record communications industry and, since the Merger Act of 1943 amending the Communications Act of 1934 (47 U.S.C., s. 151 et seq., 48 Stat. 1064, 57 Stat. 5), has been the sole such carrier except for the special record communications services of the Bell Telephone System. Appellant Frake is its manager at Bridgeton, the county seat of Cumberland County, New Jersey. One of Western Union's record communications services is that of the acceptance, transmission and delivery of money by telegraph, through the money order service generally available to the public under Federal and State filed tariffs. The transmission of money by telegraph may be effected either with or without supplemental message.

On April 26, 1950, the Attorney General of the State of New Jersey caused a raid on Western Union's office at Bridgeton and, by virtue of a search warrant, a seizure of money order documents and telegraphic messages present in the office at the time of such raid, except for those money orders and telegrams which were unrelated to wager-

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ing. The raiding authorities segregated the wagering communications from the others and took the former. At the same time defendant Frake, manager of the three-man office at Bridgeton, was arrested and later bailed.

Thereafter, pursuant to subpoena duces tecum, Western Union produced for the Prosecutor of Cumberland County all other money order and telegraphic communications pertaining to wagers as far back as November 1, 1950. In accordance with company practice, money order records had been sent to Minneapolis where the Telegraph Company maintains its money order Auditing Center for the entire domestic landline system. Such money orders prior to November 1, 1950, were not available as they had been destroyed in accordance with regulations of the Federal Communications Commission.

On June 5, 1950, a Grand Jury handed up to the Superior Court of Cumberland County five indictments:

(1) No. 5012 charging the maintenance of a common law disorderly house in violation of R. S. 2:103-1, naming Western Union and Frake as defendants;

(2) No. 5013 against the same defendants for aiding and abetting bookmaking and maintaining a statutory disorderly house in violation of R. S. 2:135-3;

(3) and (4) No. 5014 and No. 5015 for conspiracy to make book in violation of R. S. 2:119-1, naming in each instance Western Union and as co-defendants one or more persons alleged to be bookmakers; and

(5) No. 5016 for knowingly carrying messages in aid of an illegal purpose in violation of R. S. 2:171-3, a catch-all statute prohibiting express companies, telephone companies and telegraph companies from doing anything unlawful.

The cases were set for trial for September 17, 1951, and at the opening of the trial the State moved Indictment No. 5012. That indictment and that alone was tried and is the sole indictment considered in the decision and judg-

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ment of the Supreme Court of New Jersey from which appeal is now taken.

The trial occupied 25 days from September 17, 1951, until November 1, 1951. The stenographic record contains 3469 pages. Included in the exhibits were some 8000 separate papers which were the records of money orders originating at Bridgeton, New Jersey, or received at that point from elsewhere. Under New Jersey practice the appellants and respondent printed by way of appendix the portions of the stenographic record and exhibits which they deemed material. Defendants-Appellants printed as their appendix five volumes totaling 1708 pages of testimony plus 15 more pages of certain exhibits or portions thereof, while the State in its appendix printed two volumes containing 517 pages of testimony plus 24 pages concerning exhibits. The appeals were taken to the Superior Court of New Jersey, Appellate Division, but, as was within its authority and as in the opinion of the Supreme Court of New Jersey (page 25, infra), that court certified the appeals to itself on the court's own motion.

Since the lion's share of the record in the trial court contained in the printed appendices was relevant solely or primarily to the non-federal questions raised and concluded in the Supreme Court of New Jersey, as distinguished from the federal questions there raised, appellants for purposes of this appeal intend to propose, pursuant to Rule 13 of the Supreme Court Rules, a much shorter record which they believe to be pertinent to the federal questions again raised on this appeal to the United States Supreme Court. For that reason appellants concede in this appeal to the United States Supreme Court that the statements of fact embodied in the opinion of the Supreme Court of New Jersey are warranted by the evidence in the record at the trial.

Western Union was not charged in the indictment with bookmaking or with being a party to any betting or

gambling, nor was there any evidence to that effect at the trial. Rather, to borrow from the opinion below, "Defendants habitually received and transmitted at the Bridgeton office bets on horse races through the medium of telegraphic money orders and messages and payment at the office of the winnings on the bets less telegraphis charges" (page 22, infra). To state it another way, Western Union accepted at Bridgeton applications for money orders containing supplemental telegraphic messages addressed either to one Donaldson, at Clifton or at Passaic, in another county of New Jersey, or to one Rich & Company, at East St. Louis, Illinois; and Donaldson and Rich in turn sent telegraphic money orders to persons at Bridgeton, New Jersey, which monies the State contended were the proceeds payable on successful bets to the persons who had originated the wagering money orders at Bridgeton.

All of the telegraphic transactions were factually interstate in character, since the Telegraph Company's plant was so arranged in the interests of efficiency that all were handled through its reperforator switching center at Philadelphia. (Opinion below, page 24, infra.)

Manner of Raising the Federal Questions in the Trial Court and in the Supreme Court of New Jersey

Due Process. The contention that the New Jersey concept of the common law disorderly house, as perpetuated by R. S. 2:103-1 upon which the indictment tried was by its terms based, was raised at the trial after the State had rested following its rebuttal, by counsel for Western Union as one of the grounds in support of its motion for judgment of acquittal, at pages 1643a-1644a of Volume V of the appendix of defendants-appellants in the following language:

> "The next ground is that the application of R. S. 2:103-1 to the defendant, Western Union, on the facts of this case would operate to take property without

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> due process of law in violation of the Constitution of the United States and as well the Constitution of the State of New Jersey by reason of the fact that what is here sought to be imposed is a principle of law so vague, so non-specific, that the defendant cannot possibly know until the verdict of a jury is returned whether the defendant is guilty of a crime or not. It is the essence of due process of law that there be forewarning as to the criminal law so that a person may guide themselves accordingly. No such element of forewarning can be found in the application of the disorderly house concept as interpreted by the State to Western Union, and, of course, refer to the concept of the disorderly house which would make Western Union guilty of keeping one because some person or persons come upon its premises and offer messages for transmission which may amount to a violation of the criminal law or of some civil law by the persons sending or receiving the message."

Counsel for defendant Frake incorporated that ground, among others, in his motion for judgment of acquittal at page 1644a. The court denied both motions at page 1647a.

Commerce Clause. Conflict between the Commerce clause and the New Jersey concept of the common law disorderly house, as perpetuated by R. S. 2:103-1 upon which the indictment tried was by its terms based, was raised by counsel for Western Union as one of the grounds in support of its motion for judgment of acquittal, after the State had rested following completion of its rebuttal testimony, at pages 1640a-1643a of the appendix of defendants-appellants in the following language:

> "Mr. Weintraub: The next ground is that under the law the imposition of criminal liability upon the defendant under R. S. 2:103-1, and specifically the concept of a disorderly house, would operate to invade a field pre-empted by the Congress and would also operate to cause an undue burden upon interstate com-

merce, all in violation of the interstate commerce clause of the Constitution of the United States and the statutes of the Congress enacted pursuant thereto. And, of course, in dealing with undue burden our point is that if the concept of the State with respect to a disorderly house is legally sound, your Honor, it would follow that Western Union would be under a duty to censor all messages and that if it took messages of any kind relating to the violation of any of the laws of the State of New Jersey, criminal or civil, Western Union thereby could be charged with running a disorderly house.

* * * * * *

"The Court: What do you say, that the provision in R. S. 2:103-1 as to common-law crimes is unconstitutional?

"Mr. Weintraub: As applied to Western Union as it is engaged in interstate commerce, yes.

"The Court: You never raised that before.

"Mr. Weintraub: I beg your pardon. That is the point of Mr. Semingsen's testimony, to show that it would be impossible for the employees of Western Union to comply with that concept of law.

"The Court: Let me ask you a question. How can the Western Union employees in the other 21 states do it and mentally they are incapable of doing it in New Jersey? Is it because the mentality of the people in those other 21 states is greater than in New Jersey?

"Mr. Weintraub: Manifestly, sir, that is not the reason for the point, your Honor. Western Union has always taken the position in this trial, and for that matter in dealing with the F. C. C., that a statute which is expressly limited to wagering messages is one which Western Union can attempt to comply with and still discharge its duties as a common carrier in interstate commerce.

"The Court: Let me ask you this: What you want to say is that in a code state like New York, if it is

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specifically treated by statute they can do it, but if it is a common-law state like New Jersey where we are governed by the common law of England, except insofar as it has been abrogated by statute that they can't do it, is too much, and——

"Mr. Weintraub: Pardon me. Your Honor's suggestion is far off of what I am about to say.

"The Court: All right.

"Mr. Weintraub: If there were any statutes, if there was a statute, and I do not care what the derivation of it was, if there was any statute or principle of law which specifically dealt with the limited area of wagering messages, we would, your Honor, as we did in 21 other states, attempt to comply with it, but the point is this: You are not dealing with any statute which confines its operation to wagering messages; you are dealing with a statute incorporating a common-law crime which on the State's theory would make Western Union guilty of this crime. If a message were taken in numbers of some amount—your Honor at one time suggested two might be enough—which relate to the violation of any law, it is one thing to ask your employees to refuse to take messages of the specific character of wagering messages——

• • • • • •

"(3334-21) (Continuing)—and quite another thing to expect that employees could possibly be able to sit there and be encyclopedias of all the law of New Jersey and to ascertain from message whether the purpose of the sender or addressee was to commit a violation of the State of New Jersey.

"The Court: Mr. Weintraub, under your theory anything not expressly stated by statute is something that need not be considered by employees of Western Union because they are engaged in interstate commerce. As to the citizens the law applies; as to those engaged in interstate commerce it does not. As I get your argument, Mr. Weintraub, that is it, substantially.

"Mr. Weintraub: I would make the same attack upon any statute in the State of New Jersey which in express terms said that the telegraph company shall be

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guilty of a crime if it carries any message which will relate to the commission of a crime by the sender or addressee; and the attack is not that Western Union asserts some particular privilege, but the basis of the attack is that we have a Constitution of the United States which Western Union did not adopt and which provides that commerce, interstate commerce, is within the control of the Congress, and that no state may burden that commerce. Your Honor was furnished with a long memorandum in which we gave the cases of the United States Supreme Court and other Federal courts dealing with that proposition."

Counsel for defendant Frake in his motion for judgment of acquittal incorporated by reference this ground as well, at page 1644a. The court denied both motions on page 1647a.

Previously during defendants' case, while defendant Western Union was attempting to prove factually by testimony that an impossible burden upon interstate commerce was involved, the same proposition was brought to the attention of the court and was ruled upon by the courts excluding the proffered evidence. Thereupon, in the absence of the jury, defendant Western Union made a formal offer of proof, which the trial court refused to accept. It appears in defendants' appendix at pages 665a, 669a, 671a and 674a, (pp. 49, 52, 53-54, 55, infra) *inter alia*, that counsel called to the attention of the court that the purpose of the testimony was to raise and demonstrate the burden upon interstate commerce on a factual basis. The question was raised more concretely by the hypothetical question posed to Western Union's officer on the witness stand at pages 677a-680a (pp. 58-60, infra), inclusive, which the court following a colloquy excluded at page 683a, line 20 (p. 62, infra). The subsequent formal offer of proof in the absence of the jury appears at pages 695a-704a (pp. 70-77, infra). A copy of pages 665a-704a, inclusive, of defendants' appendix on the appeal below is attached as Appendix B (pp. 49-77, infra).

On the appeal below the court was asked to take judicial

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notice of the excluded testimony. Apparently the Supreme Court of New Jersey did so, as appears from the following three paragraphs on pages 24-25, infra, of its Opinion:

> "Western Union contended the theory adopted by the State would constitute a direct and prohibitive burden upon interstate commerce. It proved it was the sole telegraphic system serving the entire country and had been in existence for 100 years, transmitting messages since 1851 and money orders since 1867; it had 15 reperforator switching centers in the United States through which all messages were automatically relayed. The Philadelphia center handled an area which included New Jersey, and all messages originating in New Jersey for delivery anywhere within or outside of the State passed on wire from the transmitting office to Philadelphia, whence they were routed by a push-button system to offices of destination.
>
> "Western Union offered proof tending to show that the imposition of the responsibility attempted to be placed upon it would frustrate the service because it could not find employees with necessary legal knowledge to apply all the laws of the State relating to criminal and unlawful activities. Even if this were possible, the time consumed in performing this function would multiply the number of employees and agents needed, and the necessary element of speed would be destroyed in analyzing the messages, and other difficulties would occur.
>
> "It sought to demonstrate the difference between its case of compliance where a state law definitely and specifically prohibits taking betting messages as opposed to compliance here, where it was contended the company would be required to make a decision construing the applicable statutes on every transaction indulged in."

Defendants raised the same two constitutional points in their briefs in the Supreme Court of New Jersey. Their contentions are fairly stated (but their citations of author-

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ity are not mentioned nor discussed) in the opinion below at pages 25, 28, and 29-30, infra. The court below rejected the arguments by affirming the judgments.

The Nature and Scope of the Common Law Disorderly House in New Jersey

At the conclusion of the seven-week trial, the charge of the court to the jury at its inception attempted to define the crime in the following words:

> "... Let me say preliminarily that *research disclosed no definition of a disorderly house at common law* or in our statutes, *yet under the cases in our state, any house or place of business which the jury finds to be open to and frequented by persons who so conduct themselves there as to violate law and good order may be a disorderly house.* In brief, the charge against these defendants in this case is that they wilfully, knowingly, and unlawfully did keep and maintain at premises located at No. 82 East Commerce Street, Bridgeton, New Jersey, a place where people did bet upon horse racing." (Emphasis supplied).

Later on the court explained that there were two kinds of "disorderly house", one with a restricted meaning in that persons were disorderly so as to cause disturbance of the peace or public scandal ("Such is not the situation charged in the case at bar"), and the other the

> "enlarged sense . . . (which) includes houses or places which on account of their character are public nuisances because they are injurious to public safety, morals and decency. . . . open to and habitually frequented by persons who so conduct themselves as to violate the law and good order. . . . It is not necessary in such cases that there should be any disturbances that affect the peace and quiet of the neighborhood. *A house or place may be disorderly if the acts there done are contrary to law and subversive of the public morals, although*

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the place is conducted in a quiet manner and the peace and quiet of the neighborhood is not disturbed.

". . . *The term* as used in this indictment in its enlarged sense *as I have stated* heretofore, implies resistance to constituted authority or the like, *includes a wide variety of acts and may be applied to all persons who violate the peace and good order of society.* In its ordinary and primary sense it has been defined as meaning confused or out of order, or irregular, and when applied to society as meaning contrary to law, lawless, in a manner violating law and good order, not complying with the restraints of order and law, not observing the requirements of public law and order, offensive to good morals and public decency." (Emphasis supplied.)

The court further explained that one such violation of law and good order which "may constitute a disorderly house" is the "permitting of bookmaking, gambling or wagering."

The further element of the common law disorderly house in New Jersey is that the violations be "habitual", which the court defined in the following words:

". . . The word 'habitual' in its association with disorderly house under our law means that if illegal practices which are obnoxious to our statutes are carried on on two or more different days or occasions, then a habitual violation of the law has occurred."

In the opinion below (page 32, infra) the following is a definition of a disorderly house in New Jersey adopted from *State* vs. *Berman*, 120 N.J.L. 381:

"While we find no definition of a disorderly house at common law, nor in our statute, yet under the cases in our state any house which a jury finds to be open to and frequented by persons who so conduct themselves there as to violate law and good order may be a disorderly house."

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The extreme application of the concept by the New Jersey case law is demonstrated in the cases of *State* vs. *Dimant*, 73 N.J.L. 131, 62 Atl. 286 (1905), and *State* vs. *Martin*, 76 N.J.L. 292, 69 Atl. 1091 (1908), 77 N.J.L. 652, 73 Atl. 548, where the concept was applied to a place (a bank, or a lending company) where defendants "did make loans to (other) persons of certain sums of money at usurious rates of interest and in excess of the amounts provided by law." New Jersey statutes at the time made usury unlawful but not criminal, the penalty being in the refusal of the civil courts to enforce contracts "on which a higher rate of interest shall be reserved than is allowed by the law of the place where the contract was made", no interest whatever being then recoverable. Here too there is no criminality on the part of the person who places a bet. *State* vs. *Lennon*, 3 N.J. 337 (1949); *State* vs. *Dudley*, 127 N.J.L. 127 (1941); *Haring* vs. *State*, 51 N.J.L. 386 (1889); cf. R.S. 2:57-1.

In summary, under the New Jersey concept of a disorderly house at common law, the Telegraph Company would be in jeopardy of prosecution therefor if habitually (twice or more) its clerks fail accurately to determine the criminality or illegality inherent in a proffered message based upon the standard of:

(1) the entire criminal code of New Jersey, R.S. Title 2 (which since the indictment under review has been recodified into Title 2A); and
(2) all statutory enactments and any common law which may proscribe certain acts as unlawful, whether civilly or criminally.

In the indictment at bar, the State limited the application of the concept to acceptance of telegraphic money orders pertaining to wagers (by senders who were permitted "there to be and remain, betting, bookmaking and gam-

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bling.") The vice is that next week the State may apply the concept to accepting messages which propose usurious loans; next year, messages relating to importation of cigarettes without New Jersey tax; or, proposing prostitution; or, ignoring an agricultural law designed to eradicate the Japanese beetle. The possibilities are legion, as demonstrated hereinafter (pp. 18-19, infra).

The Concept of Disorderly House Under New Jersey Law Violates The United States Constitution

Due Process

Such a concept is indeed "as much of a trap for the innocent as the ancient laws of Caligula", to borrow from *United States* v. *Cardiff*, 344 U. S. 174 at p. 176, decided December 8, 1952.

It is elementary that due process of law requires that a criminal statute be sufficiently specific in its description of the conduct proscribed, that persons be fairly forewarned of what is denounced. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921); *Connolly* v. *General Construction Co.*, 269 U. S. 385 (1926); *Champlain Ref. Co.* v. *Corporation Commission*, 286 U. S. 210 (1932); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939).

Here indeed the Telegraph Company, if the decision below is to stand, must at its peril decide whether to take or refuse messages on the basis not only of the written words of statute law but also of the unwritten (or case law) words of the common law. Fortunately that common law concept is by New Jersey *statute* continued as a crime, so that the Supreme Court has jurisdiction conferred by the Congress to review its attempted application in this case.

It should be remembered that the Telegraph Company as a common carrier is not a volunteer, within the thought ex-

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pressed in *Boyce Motor Lines* v. *United States*, 342 U. S. 337 where it was said at page 340:

> "* * * Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

Western Union, however, could not choose to do nothing. It had to act. By reason of sections 201, 202, 206 and 501, of the Communications Act (47 U.S.C.A. 151 et seq., 48 Stat. 1064) Western Union is subject to both criminal and civil liability for refusing to take a message which it must carry. See *O'Brien* v. *Western Union*, 113 F. 2d 539 (CCA 2d, 1940). Western Union would also be subject to criminal liability if it violated the secrecy with which Congress protected these messages by Section 605. Moreover, New Jersey statutes likewise require public utilities to render service without discrimination, R.S. 48: 3-2, 3 and 4, and its violation constitutes a crime, R.S. 48:2-51. See also R.S. 48:17-19-20 imposing criminal liability for violations of provisions insuring "inviolable secrecy". Hence it is apparent that Western Union is placed in a dilemma by the application of this concept of disorderly house. Western Union must accept a message or refuse it. Either decision may involve criminal liability and according to the trial court's view, if Western Union guesses wrong, its good faith will not save it or its employees from criminal liability.

Surely a standard more definite and certain is necessary for imposing criminality when the Telegraph Company and its employees in the very nature of things must either take or reject a message. There is no right or opportunity to stand aloof.

Commerce Clause

The record below contains evidence or offer of proof the summary of which is contained in the following passage from the opinion below:

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> "Western Union offered proof tending to show that the imposition of the responsibility attempted to be placed upon it would frustrate the service because it could not find employees with necessary legal knowledge to apply all the laws of the State relating to criminal and unlawful activities. Even if this were possible, the time consumed in performing this function would multiply the number of employees and agents needed, and the necessary element of speed would be destroyed in analyzing the messages, and other difficulties would occur" (pp. 24-25, infra).

The record also contains evidence that Western Union does not attempt to resist the legislative enactment of those states which by clear words have proscribed the acceptance or delivery of wagering telegrams or of wagering money orders, or both; and that the Telegraph Company's practices in this regard are reflected in tariff provisions listing 21 states where wagering money orders are forbidden by law and 5 states where wagering messages are forbidden by law; also that, were there a clear enactment in New Jersey, it would be added to the lists as the 22nd and 6th states, respectively.

But Western Union contended at the trial and offered proof that, without utter sacrifice of the speed which is the essence of the telegraph, it would be impossible for its 55,000 employees and agents to handle the 200,000,000 messages and money orders annually if the employees had to pass upon the legality of those communications on the basis or standard which incorporates the following:

> The New Jersey Revised Statutes, Title 2, in which "there are approximately 482 sections setting forth the various crimes and elements thereof. In addition, there are other statutes which are to be found in various portions of the Revised Statutes of the State of New Jersey relating to various subjects in which there are provisions denouncing certain acts of conduct as crimes, including therein, for example, the provisions

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of the law relating to alcoholic beverages, banks and savings banks, food and drugs, insurance companies, corporations, partnerships, unincorporated associations, labor, civil service, election laws, civil rights, commerce and navigation, agriculture and domestic animals, aviation, amusement, weights and measures, etc. In addition, we have so-called common law crimes which include, among other things, conspiracy, which may be defined as an agreement between two or more persons to accomplish an unlawful object, or to accomplish a lawful object by unlawful means. In addition, we have numerous judicial decisions which have construed such statutes and have also construed the common law of crimes so that it is necessary to consult the decisions for the purpose of determining the meaning and scope of some of the crimes. In addition to the foregoing, we have a statute commonly known as the 'Disorderly Persons Act' which will be found in the Revised Statutes, Title 2, beginning at Section 201, in which there are approximately 51 sections denouncing various acts as disorderly persons acts, subject to punishment of fine, imprisonment or both. In addition to the Disorderly Persons Act just mentioned, there are other statutes which may be found in various places in Revised Statutes which provide that certain acts shall constitute disorderly persons acts and be so punishable. In addition to the foregoing, there are still other statutes which prohibit certain acts and provide for monetary penalties for the violation thereof, such as, for example, statutes relating to professions and occupations. Still further, we have various statutes and common law principles which denounce certain agreements as unlawful and against public policy, such as, for example, contracts in restraint of trade, fraudulent conveyances, agreements for divorce, and so forth." (Appendix of Defendants-Appellants, pp. 678a-679a, pp. 59-60, infra (included in Appendix B annexed hereto).

Factually, then, the concept here sought to be imposed is an impossible burden on commerce, and unconstitutional

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within the following decisions: *Cleveland Ry.* v. *Illinois*, 177 U. S. 514 (1899); *St. Louis San Francisco R. R. Co.* v. *Public Service Commission*, 261 U. S. 369 (1922); *Seaboard Airline R. Co.* v. *Blackwell*, 244 U. S. 310 (1917); *Morgan* v. *Commonwealth of Virginia*, 328 U. S. 373, 377 (1946).

The question raised is of the utmost importance to the Telegraph Company in the performance of its function in interstate and foreign commerce of rendering "a rapid, efficient, nation-wide, and world-wide wire and radio communication service" envisaged by the Congress when it enacted Section 1 of the Communications Act (47 United States Code, s. 151, 48 Stat. 1064). One of the dominant purposes of that Act was uniformity as to rates, charges, practices and services (cf. *Western Union* v. *Esteve Bros.*, 256 U. S. 566). It is one thing for the states under the police power to pass statutes proscribing wagering via the telegraph. But it is wholly different for a state to enforce criminal statutes based on varying and myriad standards. The burden thus imposed would be such that the Telegraph Company could not acquit its Congressionally imposed duty and function in interstate commerce.

Conclusion

The review here sought is properly by appeal under subdivision (2) rather than by writ of certiorari under subdivision (3) of 28 United States Code, s. 1257. The questions raised are substantial. The petitions should be allowed as prayed for.

Respectfully submitted,

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APPENDIX "A"

SUPREME COURT OF NEW JERSEY

No. A-126 Sept. Term 1952

STATE OF NEW JERSEY, Plaintiff-Respondent

v.

WESTERN UNION TELEGRAPH COMPANY, and CHARLES H. FRAKE, Defendants-Appellants

OPINION

Argued April 27, 1953; decided June 1, 1953.

On appeal from Cumberland County Court, Law Division.

Mr. Thomas J. Brogan argued the cause for appellants. Messrs. Smith, James and Mathias, Attorneys. Mr. John H. Waters (of the New York Bar), General Attorney, The Western Union Telegraph Co. Mr. William G. H. Acheson (of the New York Bar), Assistant General Attorney, The Western Union Telegraph Co. Mr. Joseph Weintraub and Mr. Adrian M. Foley, Jr., on the brief.

Mr. Joseph A. Murphy, Assistant Deputy Attorney General, argued the cause for the State. Mr. Theodore D. Parsons, Attorney General of New Jersey. Mr. Edward J. McCardell, Jr., Deputy Attorney General, on the brief.

The opinion of the court was delivered by Wachenfeld, *J.*

WACHENFELD, J.

The Western Union Telegraph Company and Frake, its manager, were indicted and convicted of operating a common law disorderly house in Cumberland County. The indictment arose out of the sending by the defendants of messages from Bridgeton to one Donaldson in Passaic County and to C. J. Rich & Company in Illinois and the payment in Bridgeton of money wired there by Donaldson and Rich & Company. The messages out of Bridgeton related to wagers on horse races and the money orders

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transmitted sums of money to the addressees for that purpose. The money orders back to Bridgeton represented the winnings less the charges made.

The State proceeded upon the theory that a disorderly house was proved by showing the defendants habitually received and transmitted at the Bridgeton office bets on horse races through the medium of telegraphic money orders and messages and payment at the office of the winnings on the bets less telegraphic charges.

The Prosecutor of the County testified he initiated an investigation concerning the operations of the defendant company and in June 1948, at his direction, a State police detective went to the Bridgeton office, prepared a horse bet on a regular telegraphic blank addressed to J. W. Donaldson, State of New Jersey. When he handed the bet to an employee, she altered the form of the message, telling the detective it would be cheaper and it would be understood in the revised cryptic form since that was the way they sent all such business. The horse on which the bet was made won and the detective returned the next day to collect his winnings.

As a result, the Prosecutor sent for the manager and advised him the company had been taking horse bets for quite some time and it amounted to ordinary bookmaking, in violation of the law. Shortly thereafter, at a conference of the various representatives of the company, the Prosecutor testified he told them they were carrying on an illegal business at the Bridgeton office which amounted to bookmaking.

One of the company's agents argued that the company was required to take these telegrams, and a discussion ensued. The Prosecutor, according to his version, finally warned them that as far as he was concerned they were engaged in illegal activities, insisted it stop, and said he would hold them responsible.

The company's representatives, however, testified the Prosecutor declined to specify or discuss the illegality of the transaction, saying he did not know what statute was violated and therefore could not cite any, but he would write to the Attorney General for an opinion and it would probably take a few months for a reply.

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There was also testimony that the Western Union could continue its existing practices until the Prosecutor received an opinion from the Attorney General, and the suggestion was made that the company have an opportunity to confer further before any action was taken by the State if it turned out the Attorney General's opinion was adverse to Western Union's position.

Following this conference and the warning alleged by the Prosecutor, individuals continued to place bets at the same office on many occasions, and in the afternoon on one of the days on which these transactions occurred, the Deputy Attorney General and a lieutenant of the State Police entered with search warrants. They seized and impounded those messages referring to horse race bets. This occurrd seven months after the conference above referred to.

The acts constituting the unlawful practice which occurred at the Bridgeton office of the Western Union were described by a great many witnesses. In fact, the course of conduct ascribed to it seems not to be denied. One witness testified she went there to bet on horses and told the girl behind the counter: "I want to play horses—bet on the horses." Another one identified 59 telegrams as her bets and pay-offs, while a third identified 99 bets and pay-off messages, including "parlays and round robins."

A man credited his knowledge as to the way and manner of betting to the information received at the defendants' Bridgeton office showing him how to express his bets on telegraphic forms, including parlays and daily double bets. He identified 91 telegraphic messages as his, while another man who frequently bet several hundred dollars on a race identified 70 telegrams representing some of his transactions. Another witness played every day, many times placing two or three bets in one day. He identified 106 telegrams expressing his views on the horses. Another daily player identified 261 telegrams as his contribution.

Often there would be 20 to 25 people in the office sending telegrams to Donaldson. Racing forms were lying around the office, and the employees of the defendant would help customers in sending out their betting messages and money orders, advising them how it should be done. Approxi-

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mately 8,000 money orders issued out of the Bridgeton office to Donaldson and Rich & Company during the six months from November 1949 to the raid in April 1950. They showed a total sum bet of $103,466.98 with total telegraphic charges of $11,119.51.

The State's case was abundantly supported by many witnesses, and much of the testimony was not denied. It indicated betting was habitually carried on with the conscious participation of the company in the illegal transactions and its facilities were employed in large-scale gaming business which was financially profitable.

The investigation resulted in the return by the grand jury of five indictments, only one of which we are concerned with here, to wit, the keeping of a common law disorderly house.

The defendants were also indicted for a violation of R.S. 2:135-3, aiding and abetting bookmakers and keeping a statutory disorderly house; violation of R.S. 2:119-1, conspiring to make book; violation of R.S. 2:119-1 by a like conspiracy; and violation of R.S. 2:171-3, knowingly carrying messages in aid of an illegal purpose.

Western Union contended the theory adopted by the State would constitute a direct and prohibitive burden upon interstate commerce. It proved it was the sole telegraphic system serving the entire country and had been in existence for 100 years, transmitting messages since 1851 and money orders since 1867; it had 15 reperforator switching centers in the United States through which all messages were automatically relayed. The Philadelphia center handled an area which included New Jersey, and all messages originating in New Jersey for delivery anywhere within or outside of the State passed on wire from the transmitting office to Philadelphia, whence they were routed by a push-button system to offices of destination.

Western Union offered proof tending to show that the imposition of the responsibility attempted to be placed upon it would frustrate the service because it could not find employees with necessary legal knowledge to apply all the laws of the State relating to criminal and unlawful activities. Even if this were possible, the time consumed in per-

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forming this function would multiply the number of employees and agents needed, and the necessary element of speed would be destroyed in analyzing the messages, and other difficulties would occur.

It sought to demonstrate the difference between its case of compliance where a state law definitely and specifically prohibits taking betting messages as opposed to compliance here, where it was contended the company would be required to make a decision construing the applicable statutes on every transaction indulged in.

The jury returned a verdict of guilty and the defendants appealed, the cause being certified here on our own motion.

I

The appellants argue that the concept of a disorderly house as applied in this case violates the Constitution of the State and of the United States. They approach this subject under the following subdivisions: (a) freedoms of speech and press; (b) conflict with commerce clause; and (c) denial of due process of law.

a

The State charged the Western Union's Bridgeton office with being a disorderly house because it habitually accepted and transmitted and profited from the sending of betting messages in violation of the laws of the State. The company suggests that this concept would not be limited to violation of gambling laws but would necessarily apply as well if the messages accomplished a violation by the sender or recipient of any law which denounces any particular conduct as criminal or civilly unlawful.

Western Union in its brief reasons: " . . . to avoid the criminal liability here sought to be imposed Western Union would have to analyze the meaning of every telegram, determine its legality and the intentions of the parties to the communication. Clearly this would be censorship." It asserts: "Under the present point we are concerned with the invasion of the basic freedoms which this concept would accomplish. . . . We contend that the challenged concept operates to impose a *previous restraint* upon the exercise

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of the freedom of speech and press." And further: "In dealing with the issue of censorship with respect to United States mail our Federal courts have expressed the repugnance of censorship to our constitutional provisions and our Federal policy."

We have difficulty in recognizing the applicability of the reasoning advanced and the authorities cited to the pending issues. The record discloses no encroachment upon the doctrine of freedom of speech as no effort was made by the appellants to utter a single word or express a thought on any topic of public interest or concern. Their only activity was to transmit for a fee messages in violation of the State law on gambling and to permit sizeable groups of men and women constantly to congregate upon their premises to place their wagers on horses and collect their winnings when they were successful. All this despite the warning by the authorities that what they were doing was unlawful and amounted to bookmaking.

We are fully cognizant there must be no trespass upon the pathways established by the Bill of Rights and the Constitution protecting the right of free speech and a free press; but we see no infringement here upon the doctrines enunciated that "there must be room for the unorthodox as well as the orthodox views." *U. S.* v. *Rumely*, 345 U. S. 41 (1953).

In *City of Louisville* v. *Wehmhoff*, 116 Ky. 812, 76 S. W. 876 (1903), rehearing denied 79 S. W. 201 (1904), a similar issue as presented here was encountered. It was contended the defendant had no discretionary power with respect to furnishing service and that it must render indiscriminately an impersonal and impartial service to all the public. The court brusquely disposed of the matter, saying:

> "The telegraph company, whether or not it has a conscience, has a duty. It is claimed that this duty is only to serve the public. Not so. Its first duty is to obey the laws just like other people. The public cannot demand a service which in and of itself involves 'a violation of the law.'"

The sovereignty of the state would indeed be a mockery if the rule were otherwise and it lacked the power to compel its citizens to obey its laws.

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In *Howard Sports Daily* v. *Weller*, 18 A. 2d 210 (1941), it was held the telegraph company had the right to refuse service which was connected with illegal operations. Otherwise, the court decided, the telegraph companies would be converted into public vehicles for the consummation of illegal acts prohibited by state laws. *Smith* v. *Western Union Telegraph Co.*, 84 Ky. 664, 2 S. W. 483 (1887); *Western Union Telegraph Co.* v. *State*, 165 Ind. 492, 76 N. E. 100 (1905); *Bryant* v. *Western Union Telegraph Co.*, 17 Fed. 825 (1883).

The right of telegraph and telephone companies to refuse service where it promotes illegality has been determined many times. *Cullen* v. *N. Y. Tel. Co.*, 106 App. Div. 250, 94 N. Y. S. 290 (1905); *Application of Manfredonio*, 52 N. Y. S. 2d 392 (1944); *Dente* v. *N. Y. Tel. Co.*, 55 N. Y. S. 2d 688 (1944); *Tela. News Flash* v. *District Atty.*, 96 N. Y. S. 2d 338 (1950); *Movietime Inc.* v. *N. Y. Tel. Co.*, 101 N. Y. S. 2d 71 (1950).

No one is under a legal duty nor can one be compelled by law to commit, foster or aid in the commission of a crime, and so too a telegraph company is under no obligation nor can it be forced to accept messages for transmission which would subject it to criminal prosecutions either as principal or as an accessory; nor is one under an obligation to accept messages for transmission which are purely gambling messages, for to do so would be contrary to law, good morals and public policy. *Bryant* v. *Western Union Tel. Co., supra; Smith* v. *Western Union Tel. Co., supra; City of Louisville* v. *Wehmhoff, supra; Western Union Tel. Co.* v. *State, supra.* Jones, Telegraph & Telephone Companies (2d ed.) §273 & 426.

The messages in the case *sub judice* on their face clearly were gambling messages, horse race bets, and nothing more. They had no news value and contained no public information. There was no attempted disguise or pretext. The import of the transaction was fully within the knowledge of the individuals and the defendants, who consciously and with full awareness not only transmitted the messages but aided and materially assisted in the composition and direction of them so that the customers' wagers could be successfully consummated.

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b

As to the application of the concept of disorderly house violating the Commerce Clause of the United States Constitution because it placed an undue burden on interstate commerce, the appellants contend all commerce involved here is interstate because all messages passed through Philadelphia pursuant to a system of communication adopted in good faith and without intent to evade the jurisdiction of the State of New Jersey and the operations are so "inextricably intertwined" that regulatory power may not be divided. They argue the State, in the exercise of its police powers, may not so interfere with the interstate commerce as to impose an undue burden upon it.

The argument thus presented is disposed of in *McCarter* v. *Hudson County Water Co.*, 70 N. J. Eq. 695 (E. & A. 1905), aff'd 209 U. S. 349, 28 S. Ct. 529 (1908). There a statute made it unlawful to abstract water from lakes of the State and transport it through pipes or conduits into any other state. Dealing with the Commerce Clause objection, the court said:

> "The State having power to prohibit the diversion of water from the lakes and streams for transportation beyond the State, the prohibition is a condition imposed upon its diversion. So the water diverted cannot legitimately enter into interstate commerce."

The same theory applies in the instant case. Inasmuch as horse race bets are illegal and unlawful in New Jersey, they cannot legitimately be classified as interstate commerce. Consequently such commerce is in no way affected or involved.

In *Ames* v. *Kirby*, 71 N. J. L. 442 (Sup. Ct. 1904), horse race bet messages and money orders were received at the Atlantic City office of the telegraph company, which transmitted the messages and money orders by telegraph to a corporation in West Virginia. Ames, acting for the telegraph company at its office in Atlantic City, received and transmitted the messages and money orders whereby bets were made on horse races in West Virginia. He, as did the defendants here, contended there was a violation of the

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Commerce Clause of the Federal Constitution, but the court said:

> "In the case before us the so-called commerce has no existence except such as may arise through an infraction of the local law against gambling. Traffic that has such an origin cannot be legitimate interstate commerce. The local prohibition attaches before any commerce commences."

A similar claim was made in *City of Louisville* v. *Wehmhoff, supra,* the court saying:

> "The carrier wants us to say that its part in this unlawful partnership to violate the moral and statute laws of the community is protected by the Federal Constitution. As was said by one of the courts, the Constitution at most gives the Congress exclusive jurisdiction to regulate interstate commerce, not interstate crime. . . . But wagering bets on horse races cannot be an article of commerce, no more than could be a lottery business. Both are *per se* immoral and deleterious to society, and clearly within the power of the state to prohibit. It could never have been contemplated by the framers of the Federal Constitution that the hands of the states were to be tied so that they could not protect themselves from such vices if one of the participants chanced to use an interstate vehicle of commerce for carrying on the business."

If any doubt remains, it is dispelled by the testimony of Mr. Lambert, Chief of the Telegraph Division of the Federal Communications Commission, a member of the FCC staff since 1935, who said there were no regulations of the FCC which would require Western Union to accept or transmit wager messages or wager money orders in the State of New Jersey.

c

It is also contended that the standard employed by the trial court was so vague and uninformative as to be a denial of due process of law, in violation of Art. 1, Par. 20,

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of the State Constitution and of the 14th Amendment of the Federal Constitution. It is urged there was no practical way by which Western Union or its employees could prior to the acceptance of a message and transmission, measure the conduct of its patrons against a standard which is at once so "sweeping and so nebulous," and as the company is subject to both criminal and civil liability for refusing to take a message it must carry, it "could not choose to do nothing. It had to act." Hence, the company, it says, was placed in a dilemma by the application of this concept of a disorderly house, and the "imposition of criminal liability in these circumstances is arbitrary and beyond the police power of the State."

We think not.

Service without discrimination does not require a telegraph company to abet criminals or to aid those who continuously break our State laws. No one is compelled to aid an unlawful undertaking, and Western Union was not forced to send horse race bets over its telegraphic lines. A public utility has not only a right but a duty to refuse service for criminal purposes. *Anders* v. *Chesapeake & F. T. Co.*, 83 F. Supp. 966 (1949); *Hamilton* v. *Western Union*, 34 F. Supp. 928 (1940).

The employees of the company here were told by the bettors what they wanted to do, to wit, bet on horse races, and the employees suggested and instructed them how to accomplish this purpose, how to word the message, and even where to direct them. They had full knowledge of the entire transactions and their import.

The company had specifically been warned of the illegality of the activities indulged in, but despite the admonition emanating from constituted authority, the practices were continued without abatement. The due process clause was not intended to give immunity or protection under these circumstances.

II

R.S. 2:103-1 provides:

> ". . . all other offenses of an indictable nature at common law, and not expressly provided for by the statute, shall be misdemeanors."

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The appellants contend this clause cannot be invoked because the comon law crime here relied upon was superseded by statute. It is not intended, they contend, that there should exist side by side both a common law and a statutory proscription of the same conduct, pointing out that the following three statutes supersede the alleged common law offenses:

(1) R.S. 2:156-2 declares: "Every building or place where the law is habitually violated is hereby declared to be a nuisance," and R.S. 2:156-3 provides that any person who maintains such nuisance shall be guilty of a misdemeanor;

(2) R.S. 2:135-3 provides that any person who keeps a place to which persons may resort for gambling in any form shall be guilty of a misdemeanor; and

(3) R.S. 2:171-3 expressly deals with the liability of telegraph companies with respect to carrying messages.

Before a statute supersedes the common law, there must be some express or specific statement to that effect.

> "When the common law and a statute differ, the common law gives place to the statute, only where the latter is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative. (Citation). It is a rule of exposition that statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced, for if the parliament had had that design, it is naturally said they would have expressed it." *State* v. *Norton*, 23 N. J. L. 33 (Sup. Ct. 1850).

The rule is followed in *State* v. *Loog*, 13 N. J. Misc. 536 (Supt. Ct. 1935), where it is held unless negative or exclusive words are used or an expression specifically abolishing the common law, such will not be its interpretation. Affirmed on the opinion below in 117 N. J. L. 442 (E. & A. 1937).

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In *State* v. *Berman*, 120 N. J. L. 381 (Sup. Ct. 1938), the court said:

> "While we find no definition of a disorderly house at common law, nor in our statute, yet under the cases in our state any house which a jury finds to be open to and frequented by persons who so conduct themselves there as to violate law and good order may be a disorderly house. Russell on Crime (9th ed.) 1381; *State* v. *Williams*, 30 N. J. L. 102; *Brown* v. *State*, 49 Id. 61; *Bindernagle* v. *State*, 60 Id. 307."

The acknowledgment of the existence of both the statutory and common law offense and the distinction between the two was dwelt upon by this court in the recent case of *State* v. *Costa*, 11 N. J. 239 (1953), where Mr. Justice Brennan said:

> "It is true that the statutory offense requires proof of an additional ingredient not necessary to be shown upon an indictment for keeping a disorderly house. The common law offense is established when it is proved that the defendant permitted his place to be used by persons whose conduct to his knowledge rendered the place disorderly, whatever his intent may have been. Proof of the statutory offense, however, must reach beyond, to his intent, and support the inference that the defendant intended that persons should resort to the place for the purpose of gambling. *State* v. *Ackerman*, 62 N. J. L. 456 (Sup. Ct. 1898); *State* v. *Griffin*, 85 N. J. L. 613 (E. & A. 1914); *State* v. *Terry*, 91 N. J. L. 539 (E. & A, 1918), reversing 89 N. J. L. 522 (Sup. Ct. 1916) . . ."

III

It is next contended there was no evidence that the Bridgeton office was a disorderly house and that the court erred in its treatment of the issue. Under one heading the appellants submit sundry matters, including denial of motions for judgment which they say should have been granted, errors in rulings, the court's charge, and its re-

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fusal to charge as requested. The following is a synopsis of the points made: (a) the activities alleged could not constitute the telegraphic office a disorderly house; (b) the court erred in charging R.S. 2:57-1 and in refusing to charge Requests 10 and 11; (c) there was no betting, bookmaking or gambling; (d) the case of *Ames* v. *Kirby, supra,* does not apply; (e) there was no evidence to bring the case within the definition of a common law disorderly house; (f) there was no proof of one of the essential ingredients of the alleged crime; (g) the essential element of guilty knowledge was absent; and (h) the court erred in refusing to charge a large number of requests.

Some of the appellants' points will not be mentioned separately, although they have all been considered. Where not specifically disposed of, we have concluded they do not possess such semblance of substance as to require observation.

As we have already pointed out, the State proceeded upon the theory that the defendants permitted persons to come together on their premises for the express purpose of engaging in betting, bookmaking and gambling and these unlawful practices, habitually carried on, constituted the common law offense of keeping a disorderly house.

In addition to the textbook definitions of the offense, it is defined in *State* v. *Ackerman,* 62 N. J. L. 456 (Sup. Ct. 1898):

> "The fact that he keeps a house which, to his knowledge, is rendered disorderly by the conduct of those whom he permits to frequent it, is the gist of the misdemeanor and will constitute guilt, whatever his intent may be."

In *State* v. *Moore,* 75 N. J. L. 619 (E. & A. 1907), writ of error dismissed 223 U. S. 709, 32 S. Ct. 519 (1911), the court held:

> "It was manifestly an indictment for maintaining a disorderly house. The specific mention of the acts of gaming carried on in that house was to exhibit the maintenance of an illegal act or series of acts therein which, when habitual, impressed upon the place the

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character of a nuisance. A disorderly house may result from the maintaining of a place wherein any of the practices mentioned in the indictment—tippling, fighting or gaming—are permitted to be carried on. As the testimony developed on the trial of the indictment, the misdemeanor could have been charged in the indictment or in a count in the indictment under section 65 of the Criminal Procedure act, but none the less the habitual use of a house for gaming, as for any other illegal practice, constitutes a disorderly house at common law."

See *Haring* v. *State*, 51 N. J. L. 386 (Supt. Ct. 1889); *McClean* v. *State*, 49 N. J. L. 471 (E. & A. 1887).

We think the State proved a disorderly house as alleged in the indictment and that the testimony, much of it not even denied, clearly brought the appellants within it.

Ames v. *Kirby, supra*, despite the appellants' objection, seems to be both applicable and controlling. The telegraph company there, a Virginia corporation authorized to do business in New Jersey, was empowered to receive and transmit messages and money by telegraph. It was so engaged and at its office in Atlantic City habitually received and transmitted by telegraph messages and money orders which were bets upon horse races made in West Virginia. The indictment alleged the company kept a place where persons might resort for betting on horses without the State of New Jersey, contrary to Sec. 65 of the Crimes Act. It was argued there, as here, that the betting transaction was not shown to have been completed in the state, but the court said:

"Every wagering contract requires two parties. Each of these parties is engaged in betting. If twenty persons resort to a place in this state to engage in betting, the mischief to them and to the community, when they all bet against some absent party with the aid of the telegraph or telephone, is precisely the same as if the twenty were betting amongst themselves. The evils attendant upon such a resort are not mitigated by concealing the bookmaker or poolseller, nor by placing

> him at a distant point either within or without the state. The place of resort is a gambling place and the keeper of it is plainly within the condemnation of section 65."

The case is followed in *State* v. *Frank*, 90 N. J. L. 78 (Sup. Ct. 1917).

In *State* v. *Morano*, 134 N. J. L. 295 (E. & A. 1946), bookmaking was said to be:

> ". . . the making of a book of bets—i.e., the making or taking and recording or registering of bets or wagers on races and kindred contests; and the particular statutory provision has ever since denounced the making or taking of a book on horse races only . . . Prior to the constitutional amendment of 1939, our law against gambling was all embrasive, and is now except as to wagers made at pari-mutuel race tracks; and the design of the provision against bookmaking is, not only to punish such violators, but also to prevent violations by others, and thus enforce the general anti-gaming policy."

Although the indictment alleged "betting, bookmaking and gambling," the court charged, and it is not controverted, that the State need prove only one of these. It defined gambling as "the act of risking or staking anything on an uncertain event."

If there is any uncertainty as to the practice indulged in by the many customers constituting bookmaking or participation therein, their conduct seems clearly to come within the definition of gambling as defined by the trial judge. The appellants assert gambling is a generic term with no particular significance, meaning nothing more than a specific charge of betting or bookmaking. We are not in accord with the thought so expressed as we subscribe to the definition pronounced by the judge below.

As to guilty knowledge, the appellants urge the crime charged here is based on the common law and it is fundamental that every common law crime requires proof of a *mens rea*. Without quarreling with this thought, we think the court's charge fully covered it. The charge given is

described by the appellants as "disjointed and contradictory." We do not join in this appraisal. We have studied it with considerable care and think it clearly and correctly defined the pertinent law and with equal clarity gave a resume of the conflicting facts and circumstances involved without infringing upon the prerogatives reserved to the jury. As to knowledge, it charged:

> ". . . it is for you to say whether the defendant corporation knowingly and willfully permitted it, and whether the defendant, Frake, operated it or conducted it knowingly. . . . Knowledge by the corporate proprietor of a house of illegal practices carried on therein is necessary to convict it of keeping a disorderly house, and mere negligence, while evidential of the fact of knowledge, is not its legal equivalent, but its knowledge may be inferred as a matter of fact from evidence showing a course of practice, or frequent acts, of which, in the natural order of things, it would have been cognizant and to which its assent would be as a matter of fact naturally implied."

The court charged R.S. 2:57-1, and it is objected to because it is not a criminal statute and was not violated by an offer to bet or instructions to bet. The statute provided:

> "All wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful."

It was pertinent to the legal status of wagers and bets and was properly charged. As to whether or not it was violated was properly left to the jury for its determination.

There was a large number of requests to charge, 71 in all. The denial of many is cited as error. In each instance the court gave the reason for its failure to comply and the situations are classified as follows: already charged; inaccurate statement of law; unwarranted conclusions; abstract principles not precise and extra of the issue; not including all circumstances; not applicable and erroneous conclusions.

We have studied the requests and the rulings in detail

as they relate to the law and the case and agree with the disposition made by the trial judge.

IV

It is said there was no evidence of knowledge as to the defendant Frake and the court erred as to both defendants in charging as it did and refusing to charge as requested on the issues of illegality of the wagers and the defendants' knowledge thereof.

As to the telegraphic messages, the appellants in their brief say: "They did relate to betting. Hence the jury was instructed in effect that messages relating to betting offended the criminal law. The court did not require a finding that the bets were unlawful where the contract of betting came into being. This was plain error."

We cannot agree. We think the messages relating to betting offended our criminal law as the court charged.

The appellants assert that the charge on "knowledge" was wholly uninformative and that the court erred in denying the motion of Frake for judgment by reason of the absence of proof as to his knowledge.

We have already commented upon the charge, as related to the question of knowledge, and see no necessity for further analysis. As to the factual situation, Frake was present while most of the activities complained of were going on. He sometimes waited upon the customers himself, and it is conceded that the messages contained only horses' names and the way in which the wager was made.

Knowledge of the operation of a disorderly house may be brought to the accused by evidence showing a course of conduct from which it may be inferred. *State* v. *Beavers*, 89 N.J.L. 370 (E. & A. 1916); *State* v. *Ensberg*, 94 N. J. L. 464 (E. & A. 1920).

In a six months' period there were 8,000 money orders transmitted accredited to Bridgeton, while in a like period throughout the entire State there were 132,103. Bridgeton, on the basis of population, accounted for six per cent of the total number of money orders throughout the State while its population was not quite four-tenths of one per cent of the total population of the State.

With transactions of this magnitude, plus the other evi-

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dence in the case, it seems almost naive to suggest that Frake did not have knowledge of what was going on. As a matter of fact, at the oral argument counsel conceded it, saying the appellants "knew what they were doing."

There was no necessity for the State to show the appellants kept the place for the purpose of having people come there for illegal conduct. It was sufficient if they permitted or suffered the illegal practices to continue with knowledge of their existence. *State* v. *Williams*, 30 N. J. L. 102 (Sup. Ct. 1862).

V

Excluding proof of good faith and advice of counsel it is said was error, as were the charge and the refusal to charge in reference thereto.

Testimony of the company's retired general counsel was offered to prove that in 1943 his staff examined the laws of all states and gave an opinion that New Jersey had no statute prohibiting the transmission of these money orders or messages. It was offered, it is stressed, to "prove the fact of advice." The appellants reason: "We do not contend that advice of counsel constitutes a separate defense so that if the jury finds that advice was given it must thereby acquit. Rather we contend that a criminal mind is essential to the State's case and any fact which bears upon the existence of that criminal mind is a fact that must be considered".

The record discloses the offered testimony was in substance the legal advice of counsel and would amount to representations as to the law. Here the State assumed and undertook proof of knowledge and the court, as we have already observed, charged in reference to it, saying: "Knowledge . . . of illegal practices carried on . . . is necessary to convict . . . and mere negligence is not its legal equivalent . . ." The inquiry is therefore whether under these circumstances the proffered testimony should have been admitted.

A like problem was presented with respect to the Federal Communications Commission license, and the court charged: ". . . the license granted to it by the Federal Communications Commission cannot throw a cloak of immunity over

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its actions if in fact they are violative of the laws of the State of New Jersey." Similarly it charged as to the challenged evidence: "I charge you that these were legal instructions and were not representations as to fact and furnish no excuse to a person for an alleged violation of the law and therefore they cannot be relied upon as a defense in this case. I further charge you that neither ignorance of the law, nor the fact that in the act complained of an accused acted on the advice of counsel, will relieve from liability."

This is sound law and in accord with our adjudications. In *State* v. *Pruser*, 127 N. J. L. 97 (Sup. Ct. 1941), the following from 1 Wharton on Criminal Law (12th ed.) 1932, was quoted with approval:

> "As however, it is a postulate of penal laws that they should be obeyed, it is a condition of those laws that ignorance of them should be no defense to an indictment for violation."

A contrary doctrine would spell chaos and an impossibility of law enforcement. If ignorance is no defense, then legal advice that the law was not applicable or effective falls into a similar category and is likewise unavailable to exculpate the defendants. We see no error.

VI

The appellants argue there was error in submitting to the jury the question of whether bookmaking or gambling occurred on the premises of the Western Union at its Bridgeton office, upon the ground there was no evidence to support a finding on that issue.

This is repetitious and has already been dealt with. We said there was an abundance of evidence, much of it not even denied, warranting the course adopted by the trial court. We have also said even if there was uncertainty as to the practice habitually indulged in by the appellants' many customers constituting bookmaking or participation therein, their conduct clearly came within the definition of gambling as defined by the court. We see nothing new to consider by the argument here presented.

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VII

It is claimed there was error in the court's charge on aiding and abetting as it was utterly foreign to the proof and the indictment and, further, the definition of aiding and abetting was erroneous.

Frake could not be harmed by it because it did not mention him. It was limited entirely to the corporate defendant and it followed a dissertation on the activities and conduct of Frake illustrating that an isolated incident would not be sufficient to fasten upon him responsibility but "continued and habitual" occurrences would be.

In this regard the court pointed out if the "corporation knowingly and willfully permitted it," referring to Frake's conduct, the jury could take cognizance of it.

The distinction between principal and accomplice or aider and abettor has been abolished in our jurisdiction for purposes of indictment and punishment. *State* v. *Cooper*, 10 N. J. 532 (1952). We see nothing prejudicial in this respect warranting relief.

VIII

Next it is said there was no evidence that Frake was a keeper; the verdict was against the weight of the evidence, and the court erred in its charge and its refusal to charge on this subject.

Briefly, the argument seems to be that Frake's duties were precisely the same as those of the three female employees, and like all other employees he was bound by the large volume of printed instructions and the various directives issued to the field. In short, he was just an employee without any semblance of discretion or control despite the empty title of manager, reliance being placed upon *Engeman* v. *State*, 54 N. J. L. 257 (Sup. Ct. 1892); *Bindernagle* v. *State*, 60 N. J. L. 307 (Sup. Ct. 1897); *State* v. *Harrington*, 87 N. J. L. 713 (E. & A. 1915), holding "if it was beyond his control" there would be a defense.

Merely because an employer tells an employee to commit a crime does not exonerate the employee in the eyes of the law. He need not obey such a command and if he does, he

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is answerable to the authorities in the event his conduct violates a statute prohibiting it.

Frake was the manager and in charge of the Bridgeton office and we think his responsibility was clear.

IX

The court below, it is claimed, committed numerous errors, each of which merits reversal, which in sum amounted to a denial of a fair trial. In their brief the appellants say: "We here urge numerous errors as grounds for reversal and also contend that in the sum the errors and events herein discussed operate to deny a fair trial in violation of due process of law guaranteed by the federal and state constitutions . . . The printed word is here. The attitude of the court, the emphasis, hostilities and inflections are not . . . We believe the responsibility lies with the trial judge."

1

First it is said after the defense concluded the opening statement, the court inquired of defense counsel: "Do I understand that you admit for your client, Frake, that he conveyed or took and conveyed via telegraph messages which contained bets on horses? Do you deny that or admit it?" One counsel curtly replied: "I entered a not guilty plea." The other, when inquired of, replied: "I have nothing to say. The whole business is so bizarre and absurd. The State brought this case so let him prove his case."

"The Court: That is your answer?

"Counsel: Yes.

"The Court: We will now recess."

Counsel then moved for a mistrial by reason of the action of the trial court as outlined above, contending: "The net effect of the question propounded by the court is to call on the defendants to admit to part of the State's case and, in fact, a very vital part because of the various ramifications that part entails, or to refuse that part of the State's case, which refusal would prejudice the jury of the position of the defense when the defendants put their case into evi-

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dence." The court denied the motion, commenting: "Certainly the court in the performance of his duties is not only entitled but I conceive is under an obligation to clarify the issues." He then charged the jury:

> "Ladies and gentlemen of the jury: Immediately prior to the recess a question was asked or questions were asked by the court, directed to Mr. Howell, who represents the defendant, Frake, and to Judge Brogan, who is one of the counsel for Western Union.
>
> "The jury is instructed to disregard and eliminate from their minds the conversation that ensued and we will proceed with the trial."

When counsel's attitude was stated, the court not only pursued the inquiry no further, but even charged the jury to disregard it. We find no authority under these circumstances justifying the granting of a mistrial.

State v. *Craig*, 9 N. J. Super. 18 (App. Div. 1950), holds the opposite for which it is cited. In an expression *obiter dictum* the court implied, in view of Rule 2:7-3, it was better practice for the court to refrain from interrogating or requesting defendant or his counsel to make known his defense during the trial. Yet it found no error in the principal question presented. Here, when counsel evinced no desire to cooperate in the clarification sought, the judge immediately instructed the jury to disregard and eliminate the incident, and we see nothing indicating the appellants suffered manifest wrong or injury.

2

Throughout the trial, say the appellants, the court minimized efforts of the defense by characterizing offers of proof as a claim of "immunity" to violate the law. "The trial court repeatedly interrupted with queries to the defense as to whether it contended that the Prosecutor could 'grant immunity' and repeatedly instructed the jury during the trial that no such immunity could arise . . . Thus the efforts of the defense . . . were pauperized by the trial judge and in effect the defendants were charged with injecting a frivolous issue into the case."

We have read the testimony of every incident referred to in the briefs and find no "specific objection thereto was made" as required by Rule 1:2-19(a) or that the defendants made known their "objection to the action of the court and the grounds therefor" as required by Rule 2:12-7. These matters do not come within the exception stated in Rule 1:2-19(a), nor do we find there "appears from the entire record of the proceedings had upon the trial that the defendant thereby suffered manifest wrong or injury."

In many instances the record shows complete accord of the defendants' counsel with the court's utterances and rulings:

> "The Court: I don't think you can inquire into the operations of the Prosecutor in writing letters to the Attorney General. The strict issue in this case is: will the State be able to prove the allegations under the indictment if they constitute a crime in the State of New Jersey. That is the issue. You admit as the Prosecutor he can't clothe a defendant corporate or individual with immunity.
>
> "Mr. Brogan: That is as true as anything you have ever said, Judge.
>
> "The Court: Thank you very much."

And again:

> "Q. Nor did you ever say to them you are keeping a disorderly house? A. No, sir, I didn't.
>
> "The Court: Suppose he didn't. Does that preclude the Prosecutor or the State?
>
> "Mr. Howell: No, it does not, your Honor."

Under our rules there is nothing before us to determine.

3

Again it is said the court unreasonably restricted the defense throughout the trial. Examples are the refusal to permit cross examination as to why Stanger had done nothing in the two-year period which intervened between Trooper Hunt's message of June 1948 and the raid of April

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26, 1950; and why he did not close down Western Union's operations in September 1949.

Stanger was asked: "Will you explain to us why you didn't then and there shut down Western Union?" The Prosecutor's objection to this question was sustained, and we think properly so. The defendants made known their dissatisfaction with the court's ruling in this isolated instance, but otherwise the record reveals no specific objection to the rulings of the court on these points in compliance with Rule 1:2-19(a) and Rule 2:12-7. Furthermore, we do not think the matters complained of constitute "plain errors affecting the substantial rights of the defendant," excusing the absence of an objection. Rule 1:2-19(a).

4

When the witness Stanger was on the stand the Prosecutor asked him if in making the raid he had with him "a search warrant from the Honorable David L. Horuvitz, Judge of this court." The appellants urge this was an effort made to have the jury infer that the trial judge had thus indicated the defendants' guilt. A motion for a mistrial was denied and cited as error.

The record shows when counsel made the statement that a search warrant, when issued, was not in the slightest degree evidence of guilt, the court immediately concurred, saying: "I say to the jury neither a search warrant nor an indictment is evidence of any guilt," and repeated it: "I want to state to the jury again that the issuance of a search warrant is no evidence of guilt nor is an indictment. If there is any intimation in the jury's mind that the fact that I signed the search warrant indicates guilt, disabuse your minds of it. I have made my position clear to the jury."

> "Mr. Weintraub: You have made your position clear, yes."

How counsel can now contend there was error in refusing to grant a mistrial under these circumstances is beyond us and hardly warrants further comment.

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5

Criticism is directed to the court's excluding testimony, its allowance of cross examination, and the alleged confusion created thereby as it pertained to the witness Stark.

The principal difficulty encountered was centered on the following question: "What was the report, the advice, which you gave to Western Union with reference to its duty in the matter?" It was objected to by the Prosecutor and there ensued many pages of colloquy and argument. The court finally recessed to consider briefs submitted by the defendants and returned some hours after to rule upon the question and continue the case. The objection made was sustained.

The appellants are dissatisfied because "the net result was that the jury was left with a confused impression that the defendants had violated a host of statutes," and "The result certainly was the placing of undue emphasis upon the denial of the validity of the position of the defense."

We are not prepared to say our judicial determination would have paralleled the trial court's in its control of the cross examination referred to, but a wide discretion is always allowed in the conduct of a trial and the record here bespeaks of no abuse entitling the appellants to the relief sought.

6

Referring to the defense of undue burden upon interstate commerce, it is said: "The court's treatment of the issue reflects preconceptions as to the case, and the court erroneously assumed and implied to the jury that "immunity" to violate the state law was the appellants' defense.

The matters presented here practically repeat the complaints made under Points I(b) and IX(2) and require no further observation.

8

The State issued subpoenas directing some witnesses to appear before a grand jury when it was not in session, and when the witnesses answered, they were sworn pri-

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vately and examined. The testimony thus taken was used at the trial to "refresh" the memories of these witnesses.

Appellants assert the testimony thus secured was obtained by an abuse of process and that such testimony should be suppressed as the sole effective remedy against the abuse or the facts be submitted to a jury for its consideration as to what testimony should be believed. The court concluded it was interested only in the question of "voluntariness" and the appellants say: "Even on this issue the court refused to permit examination which would bear upon the voluntariness."

This is not so. The court ruled:

> "But in this particular instance I shall not preclude the defense from showing on cross examination, if they can, or at least going into the question of whether there was any promise of reward or whether the witness was in fear or whether there was any coercion or duress exercised. Certainly all that can be gone into on cross examination.
>
> "I think the question of the subpoena is not a matter that I am going to let you inquire into. I think it is an attempt to attack the subpoena collaterally, which cannot be done in this trial."

No effort thereafter was made to embrace the opportunity given by the court to show the testimony was coerced and not voluntary. Counsel refused to ask whether the answers were voluntary but insisted upon inquiring whether the witnesses "voluntarily appeared."

The quality of the testimony given under these circumstances should be determined by the standard prescribed by the court, but the appellants chose not to evaluate it on that basis. Not a case nor an authority is cited in support of the appellants' view. If it was true, voluntary, and uncoerced, we know of no reason why it should not have been admitted. It should not be inferred, however, that the procedure criticized has our tacit approval. We are merely deciding the testimony so secured could not be nullified by the collateral attack made.

9

The prosecution, it is said, insisted on "asking questions which incorporated the unproved postulates that Donaldson was a bookmaker, that the bets were made at Bridgeton, and that the messages constituted the completed bet."

There was continuous and constant argument throughout the trial on this subject and the court finally said: "No, I am not going to have any more argument about this. This is too fundamental a question and I think we are quibbling with words."

The appellants allege the jury could infer from this that "the defense was captiously protracting the trial with 'quibbling.'" If the jury arrived at such a conclusion, it would find some support in the record, but it could not fairly be attributed to the comment of the trial court. We see no manifest wrong or injury suffered by the appellants in this respect.

10

At the conclusion of the charge the court asked objections to it be recorded. There were about 71 exceptions referring to the failure to charge as requested, and when these were completed, the court left the bench and directed counsel to complete the record in his absence. Thereafter counsel continued with about five more pages of exceptions and contend: "Thus the court did not even listen to the objections, much less consider them."

The appellants' position is rather all-inclusive. The complaint is that the judge was not there when he should have been and then again when he was there he did not do what he should have done.

No reason is presented nor an authority cited showing how the appellants were prejudiced or harmed, and the absence of the court while the objections were being noted on the record did not affect their net worth on appeal.

11 and 12

At the close of the Prosecutor's summation, the defense registered objections to the State's argument and asked for instructions to the jury that certain portions should

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be disregarded and it alleged other statements made by the Prosecutor were "deliberate efforts to place the blame of a protracted trial upon the defendants."

Viewed in light of the trial court's charge, we do not think they constituted grounds for reversal. See *State* v. *Grillo*, 11 N. J. 173 (1952); *State* v. *Tanaimore*, 3 N. J. 516 (1950); *State* v. *Continental Purchasing Co.*, 119 N. J. L. 257 (Sup. Ct. 1938), aff'd 121 N. J. L. 76 (E. & A. 1938); *State* v. *Hauptmann*, 115 N. J. L. 412 (E. & A. 1935), certiorari denied 296 U. S. 649, 56 S. Ct. 310, 80 L. ed. 461 (1935).

13

The trial court here, it is charged, "refused to listen to argument." The frequency and length of the many arguments made and indulged in, the repetitious insistence of counsel, and the entire record indicate to the contrary. We think the suggested reflection is unwarranted.

14

It is urged error was committed because what the court said "gave the jury the false impression that Western Union could be convicted only if Frake was convicted."

In the very next paragraph the appellants' brief quickly concedes: "A very careful reading of the court's charge might be said to free it of this manifest error. . . ." But the complaint is it was doubtful if the jury, listening to the rapidly read charge, could make so careful an analysis of it, contending the court should "have been obliged to clarify his charge."

In this respect the court charged:

> "You may find both defendants guilty as charged, or you may find both defendants not guilty, or you may find one defendant guilty and the other not guilty. Separate verdicts must be returned as to each defendant."

How it could have more lucidly been said is beyond our comprehension.

Under Point III the appellants said the court's charge was "disjointed and contradictory." It is now said to be "utterly vague and indefinite. . . . It could only confuse."

No particular clause, statement or portion of the charge is complained of or singled out. It is simply condemned as a whole without the assignment of a reason other than the conclusion already mentioned. The appellants are content with the argument that the trial court should have rendered a charge which was "direct, explicit and clear."

We have already given our appraisal of the court's charge, and a re-examination of it brings us to the same conclusion. It is full, fair and adequate and embodies every legal obligation consistent with established judicial practice and tradition. Furthermore, it gave the defendants all the protection to which the law entitled them.

Our examination of the entire record fails to disclose that the appellants suffered manifest wrong or injury.

The judgments below are accordingly affirmed.

APPENDIX "B"

Defendants' Witness, Walter W. Semingsen, Direct

Mr. Fisch: I object to that, if your Honor please. It is certainly a leading question. There isn't any question in this case that would warrant this question being asked. It is certainly not proper. A proper question, I submit, would be, "What is the purpose?"

The Court: I think if you reframe the inquiry it will be all right, Judge.

Mr. Brogan: I would like to say now, so that you will have in mind any ruling in the future, that I intend to show by this witness that certain conditions which we are expected to comply with by the State of New Jersey, if the State's position is true, would put an undue burden upon interstate commerce.

The Court: Let me rule at this point.

Mr. Brogan: That is the background of my thinking in questioning.

The Court: My suggestion is that you reframe the question. If you want to pursue your original inquiry, I will rule on it.

Mr. Brogan: I will abandon the question.

Q. During those years mentioned, from 1948 to 1951, inclusive, did all of your messages go from Bridgeton to Philadelphia and back to New Jersey where the message was from Bridgeton to any other place in New Jersey?

A. Yes, that is true.

Q. When was the reperforator system set up in Pennsylvania?

A. In 1947.

Q. Prior to 1947, of course, this method was not in vogue?

A. Prior to 1947, so far as the New Jersey territory is concerned, messages did not flow through an automatic switching center such as Philadelphia. Part of that time messages from Bridgeton were either relayed manually at Philadelphia to points in New Jersey, or they were relayed to New York City and back into New Jersey.

Q. What I want to know, Mr. Semingsen, is this, what considerations dictated the location of the switching centers and the method of handling messages, which you have described?

A. The controlling considerations as to the locations of these automatic switching centers, if that is what you have in mind, are purely economic and efficiency of operation. It was a system devised to handle a large volume load in the most expeditious and efficient manner that we could.

Q. Are messages originating in New Jersey, for delivery in New Jersey, handled by the same personnel and the same facilities as those which are used to handle messages originating in New Jersey for delivery in other states of the United States, or are there separate employees for New Jersey as against those who handle messages for the rest of the United States?

A. No, there are not separate employees. There are separate operations that handle messages destined to the State of New Jersey. The same employees at the point of origin,

the same employees at the Philadelphia switching center, or any switching center for that matter, will handle the messages, regardless of their destination, whether they go to New Jersey or outside the State of New Jersey.

Q. Or to Oakland, California, or any place else?

A. That is true.

Q. Do the employees at the switching centers who are engaged in routing messages to the points of destination read the contents of the message?

Mr. Fisch: If he knows of his own knowledge.

Q. Yes, if you know.

A. Yes, I do know of my own knowledge. They do not read the contents of the message. They are under specific instructions to read only the point of destination so that they can push buttons to switch the message to its proper destination.

Q. Have you any idea of the number of messages and money orders carried annually by Western Union?

Mr. Fisch: Yes, or no.

A. Yes, I do.

Q. Have you prepared an exhibit to be prepared under your direct supervision, a statement of the number of messages and money orders carried annually by Western Union?

A. Yes, I have.

Q. Those that originated in the United States?

A. That is correct.

Q. Have you also taken out and made a separate computation of those that originated in New Jersey?

A. Yes, sir.

Q. The same thing with regard to money orders in the United States and in New Jersey?

A. Yes, sir.

Q. I show you what purports to be a statement first of the number of messages and money orders carried annually by Western Union, and ask you if that is the computation that you have prepared or had prepared under your supervision.

A. Yes, that is the statement.

Q. I show you the same character of computation with regard to the number of employees and the number of agents of Western Union, both in the United States and in New Jersey, and ask you has that computation been prepared by you or under your supervision?

A. Yes, it was.

Mr. Brogan: I would like to offer them in evidence, after Mr. Fisch has examined them.

Mr. Fisch: I object to them. I see no relevancy to them. They are not relevant, nor are they competent, nor are they material.

The Court: I will deal with them later.

Proceed.

Mr. Brogan: May I have these marked for identification as one? There are only two sheets.

The Court: They will be marked D-11 for identification.

(The two sheets referred to are received and marked Exhibit D-11 for identification.)

Q. I direct your attention to an exhibit marked for identification D-11, and ask you if you will examine that and tell us how many messages were handled by Western Union in the United States during the years 1948, 1949 and 1950.

Mr. Fisch: I object to that, if your Honor please.

The Court: How is that material or relevant, Judge?

Mr. Brogan: It shows the extent of the company's business. It shows the problems to the Court and jury with which this company has to deal.

The Court: I can understand where statistics relating to messages in New Jersey might be interesting——

Mr. Fisch: Even then——

The Court: I say "might be," but as far as what happened in California is concerned——

Mr. Brogan: I am not going to ask that. I am going to ask only for totals. This is as a background for part of this examination. I have in mind the imposition of an undue burden on interstate commerce as far as this business is concerned by conditions which are imposed by what has developed at this trial.

Mr. Fisch: I object on the ground it is not relevant or material to the issue in this case.

The Court: I am going to let the witness testify how many messages there were. I can't see the relevancy of it at all, but I don't want to restrict the defendant.

Answer the question. Read the question.

(The stenographer reads the question.)

Mr. Weintraub: Mr. Fisch is laughing. May that be eliminated without any loss in the case?

The Court: Let us eliminate any laughing.

Proceed.

Mr. Brogan: If your Honor please, I would like the record to show that as a trial tactic it is a little bit unusual.

The Court: Strike out the remarks, and proceed.

Now, gentlemen, let us proceed.

Propound the question to the witness and let us have the answer.

Mr. Howell: I want to be joined in that same comment in the record.

The Court: Strike out the remarks of Mr. Howell. Proceed. The sooner we all agree we are here to try a case, the faster we will move along.

(The stenographer reads the question again.)

A. During the year 1948 Western Union handled 201,878,308 telegrams. During the same year we handled 8,576,946 telegraphic money orders. During the year 1949 we handled 185,673,389 telegrams, and 8,308,159 telegraphic money orders. During the year 1950 we handled 186,396,964 telegrams, and 7,974,651 telegraphic money orders.

Q. By how many employees was this done in the respective years examined, directing your attention again to D-11 for identification.

Mr. Fisch: I don't like to continue to be on my feet with objections—

The Court: I understand. Do you want to be heard, Judge Brogan?

Mr. Brogan: Yes. I think the jury is entitled to know the army of employees that we have and the burdens that are

imposed on those people whose qualifications, education and otherwise I will attempt to show, and that the burden of censorship in these circumstances would have been an utter impossibility.

The Court: Legally I don't think the argument is—strike it out.

I will sustain the objection.

Mr. Brogan: If your Honor please, I wish the record to show that the offer of proof which I have made is, in my opinion, an affirmative defense which suffers by the exclusion of this exhibit and the testimony contained therein.

I offer it to prove that the number of employees, if you wish to dictate this——

The Court: No, I think you have stated it. Do you have anything further to state?

We will have a recess at this time.

(A recess is taken.)

Mr. Howell: May I be heard? I remember the Court's ruling to be if he was going to sustain the objection he was going to give us an opportunity to be heard.

The Court: I heard Judge Brogan.

Mr. Howell: I am speaking for Frake.

The Court: I do not think we ought to have two addresses to the Court embodying the same subject matter. If you have anything further to add, all right; if you are going to cover the same subject matter I don't think so.

Mr. Howell: I do not wish to infer I can do it in more enlightening terms than Judge Brogan, but I just have a hope maybe South Jersey lingo might convey the thought a little more clearly. My point about it is this: The State took a considerable period of time putting in what they say is somewhere around 9,000 messages—I am assuming their figure is substantially correct. And the reasonable inference which they ask to be drawn from that was that the employees of this office, and the employees of Western Union everywhere, but in particular in this office, were charged with a duty of examining and being cognizant of the con-

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tents of what those messages may have imparted to an individual, if he had a proper education regarding knowledge of race tracks. Now, it seems to me if any inference is to be drawn it becomes extremely relevant that it be shown the number of employees throughout New Jersey, and the country as a whole, because it is an interstate matter. We have now established that these messages have to go across the State line in Philadelphia if delivered to New York, and Chicago if they are going to St. Louis—to show that the inference cannot be drawn and is an unfair inference in view of the volume of transactions. We further feel that evidence is important for the purpose of showing that this old common law offense of disorderly house is totally inadequate to the situation here involved, because of the character and transaction that Western Union is required to conduct under the Federal Act.

The Court: I can see where transactions emanating from Bridgeton, going through Philadelphia, and terminating in the Passaic office, are evidential, material and relevant. What transpires in Oakland, California, or Oshkosh, I do not think is evidential. I do not want to have a protracted argument. I have ruled. I have heard you. The ruling will stand. Proceed.

Mr. Brogan: Your Honor, I had not quite finished what I had to say.

The Court: Proceed.

Mr. Brogan: Without being obdurate, I take it to be my duty to state on the record what I intend to prove. I had not quite finished when we adjourned. I intend to put it on the record for the reason that should it ever become necessary to have a review, certainly an Appellate Court would want to know what it was I wanted to prove. Now, I wish to state on the record what I intend to prove, in the presence of the jury or out of the presence of the jury, as your Honor thinks appropriate.

The Court: Haven't you stated your position clearly?

Mr. Brogan: No.

The Court: Has Mr. Howell stated your position?

Mr. Brogan: No.

The Court: I am going to hear the Judge, and I will

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hear him right now so we might proceed with this trial. Go ahead.

Mr. Brogan: I propose to show in 1948 this company had operated its business through 38——

Mr. Fisch: Your Honor please, that is just the point I rose to object to.

The Court: That's right, Judge. You are doing exactly what the Court thinks you cannot do. I will tell you so you will not think I am trying to limit anybody—that what transpires in New Jersey and Passaic I consider to be evidential. What transpires out of the State is of no moment, I think, in this State. The gentleman testified in Philadelphia nobody read the messages, so how many employees there were in Philadelphia would be of no moment.

Mr. Brogan: I venture this further suggestion—I do not desire to argue any further or get into any further discussions. We offer here and will prove an undue burden on interstate commerce——

The Court: I do not want to get into any discussion of the law with you, but I consider that irrelevant.

Mr. Brogan: How can you say it is relevant or irrelevant until you know what that defense is and have heard it, and then you may strike it.

The Court: No, my ruling stands. Let us proceed.

Mr. Brogan: Your Honor, then, refuses to permit me to put the facts that I intend to prove by Exhibit D-11 in full, out of the presence of the jury?

Mr. Fisch: His Honor didn't say that. And I would have no objection, if your Honor please, to counsel spreading on the record what he intends to prove without the presence of the jury.

The Court: All right, he can do it after 4 o'clock. Proceed.

Mr. Brogan: Will your Honor instruct the stenographer to make a mark, so that this may be inserted at the proper place?

The Court: Make a mark and insert it *nunc pro tunc*. Proceed.

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By Mr. Brogan:

Q. Have you testified, Mr. Semingsen, as to the number of messages and money orders carried in the State of New Jersey for the years 1948, '49 and '50?

A. No, I haven't.

Q. Will you do so?

Mr. Fisch: I object to that, unless it is confined——

The Court: He is getting closer.

Mr. Fisch: Yes, he is getting warmer, I will admit that. But I still object unless it is confined to the number of messages which were sent between Bridgeton and Passaic, and vice versa.

The Court: I will permit it. Answer the question, please.

By Mr. Brogan:

Q. Will you please answer?

A. Yes. During the year 1948, there were 3,944,230 telegrams originated in New Jersey, and 298,063 telegraphic money orders. During the year 1949, there were 3,602,037 telegrams, and 292,219 telegraphic money orders. During the year 1950, there were 3,850,538 telegrams, and 264,205 telegraphic money orders.

Q. Will you tell us the number of employees in New Jersey for the year 1950 only?

Mr. Fisch: I object to that.

The Court: Objection sustained.

Mr. Brogan: I offer to prove, sir, the number of employees, exclusive of messengers, that have transacted this volume of business in 1950, and the number of agents in addition thereto that were necessary.

The Court: I permitted you to show the number of employees in the Bridgeton office and the Passaic office. There might be an unequal load—there might be fifty times as much business transacted in the Newark office as the New Brunswick office—I don't know. I don't think we are interested in those proportions.

Mr. Brogan: Your Honor says it is irrelevant?

The Court: I have ruled, Judge Brogan.

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Mr. Brogan: Will the Court please instruct the stenographer that I will put it in later?

The Court: Yes.

Mr. Brogan: I also wanted to say we do not have available the number of employees for 1948 and 1949, and there is no significance in taking 1950 only. That is the only year we have a record of.

Mr. Howell: I join the application.

By Mr. Brogan:

Q. What is the essence of telegraphic service which your company renders?

Mr. Fisch: I object. I don't quite understand that question.

The Court: Well, the witness probably does. I will permit it.

A. Speed.

Q. Speed in transmission of information from one place to another?

A. That is correct.

Q. Now, Mr. Semingsen, this is a lengthy question. Keeping in mind the scope of the operations of Western Union in the State of New Jersey with reference to the transmission of messages in interstate commerce and the essential element of speed to which you have already referred, what, in your opinion, would be the effect upon Western Union's ability to discharge its duty as a common carrier in interstate commerce if it is assumed that the employees and agents of the company in New Jersey, responsible for the transmission and delivery of messages in this State, were chargeable with the duty and function of ascertaining whether the messages so handled by them constitute violations of, or would aid the sender or addressee to accomplish the violation of the various statutes and legal provisions which prohibit and denounce certain conduct as criminal or illegal? In answering the question, please keep in mind the following provisions of the statute and the following legal principles which I will now relate to you. In our statutes containing general provisions relat-

ing to crimes which appear in Revised Statutes, Title 2, beginning at Chapter 103 and ending with Revised Statutes, Title 2, Chapter 176, Section 60, there are approximately 482 sections setting forth the various crimes and elements thereof. In addition, there are other statutes which are to be found in various portions of the Revised Statutes of the State of New Jersey relating to various subjects in which there are provisions denouncing certain acts of conduct as crimes, including therein, for example, the provisions of the law relating to alcoholic beverages, banks and savings banks, food and drugs, insurance companies, corporations, partnerships, unincorporated associations, labor, civil service, election laws, civil rights, commerce and navigation, agriculture and domestic animals, aviation, amusement, weights and measures, etc. In addition, we have so-called common law crimes which include, among other things, conspiracy, which may be defined as an agreement between two or more persons to accomplish an unlawful object, or to accomplish a lawful object by unlawful means. In addition, we have numerous judicial decisions which have construed such statutes and have also construed the common law of crimes so that it is necessary to consult the decisions for the purpose of determining the meaning and scope of some of the crimes. In addition to the foregoing, we have a statute commonly known as the "Disorderly Persons Act" which will be found in the Revised Statutes, Title 2, beginning at Section 201, in which there are approximately 51 sections denouncing various acts as disorderly persons acts, subject to punishment of fine, imprisonment or both. In addition to the Disorderly Persons Act just mentioned, there are other statutes which may be found in various places in Revised Statutes which provide that certain acts shall constitute disorderly persons acts and be so punishable. In addition to the foregoing, there are still other statutes which prohibit certain acts and provide for monetary penalties for the violation thereof, such as, for example, statutes relating to professions and occupations. Still further, we have various statutes and common law principles which denounce certain agreements as unlawful and against public policy, such as,

for example, contracts in restraint of trade, fraudulent conveyances, agreements for divorce, and so forth. Keeping in mind the provisions of law which I have narrated to you, will you now be good enough to answer the question I originally propounded to you and which I will now repeat for your convenience.

The Court: Maybe he has the question and it won't be necessary. Do you have the question in mind?

The Witness: I have the question in mind. I defy anybody to keep in mind the laws, but I know what he means. I know what he's after.

The Court: Strike out the remark "you defy anyone to keep in mind the law."

The Witness: I would like to have the question repeated as well.

By Mr. Brogan:

Q. Keeping in mind the scope of the operations of Western Union in the State of New Jersey with reference to the transmission of message in interstate commerce and the essential element of speed to which you have already referred, what, in your opinion, would be the effect upon Western Union's ability to discharge its duty as a common carrier in interstate commerce if it is assumed that the employees and agents of the company in New Jersey, responsible for the transmission and delivery of messages in this State, were chargeable with the duty and function of ascertaining whether the messages so handled by them constitute violations of, or would aid the sender or addressee to accomplish the violation of, the various statutes and legal provisions which prohibit and denounce certain conduct as criminal or illegal?

Mr. Fisch: I object to the question. It is hypothetical. It is certainly a very long question, and I think as a hypothetical question it embraces many elements which are not relevant or material to the issue in this case, and fails to embrace many other elements which are in this case.

Mr. Howell: I am not going to argue the question right

now, but I think this time, despite what might be said before in the form of objection, when counsel poses an objection to a hypothetical question on the basis it does not incorporate some essential element, he points out that so the Court may have the benefit of any omission in the hypothetical question so it may be supplied. He says it does not include them. Does not include what? I ask the Court very respectfully to make Mr. Fisch perform what we feel is a duty.

Mr. Brogan: In justification of the allegation that we violated as common carriers in this instance, the provision of any law, and that we did it in our place of business habitually, we are entitled under this Court's ruling as to what constitutes a disorderly house, to press this question. Now, your Honor will remember— this is a brief digression —that in the *Ames vs. Kirby* case, with which your Honor is quite familiar—you will remember that the second part of the case dealt with an element which we have previously tried in vain to put in this case, namely, the burden of interstate commerce—but that is parenthetically. We have the duty to live up to the law, and we are not living up to the law if in our place of business messages are sent out—in fact, these various fields which are denounced by our statutes, which I have tried to mention religiously—I have omitted none that I know of. Secondly, in my opinion, this question is a proper question.

The Court: Do you think the volume of business immunizes you from the operation of the New Jersey law? You do or you do not?

Mr. Brogan: Your Honor, before we have any debate on the cardinal rule, terms ought to be defined.

The Court: I am not debating. I am asking you a question which you may or may not answer. Will you repeat the question, please?

(The question is repeated by the stenographer as follows:

"The Court: Do you think the volume of business immunizes you from the operation of the New Jersey law? Do you or do you not?")

Mr. Brogan: I do not think, your Honor, that the question has anything to do with this hypothetical question.

The Court: All right. Now, has everybody been heard?

Mr. Brogan: Have I made myself entirely clear with regard to the basis for the question?

The Court: Yes.

Mr. Howell: I want to add to it. In effect, this issue now being presented to the Court in relation to the statute that is involved in this issue is substantially the same issue which was raised in *Ames vs. Kirby,* as to another section.

The Court: Justice Brogan has argued that.

Mr. Howell: I want to be heard. I want to state my position. I contend having once been passed on by the Supreme Court, through Justice Pitney, on Section 135, it is automatically done, in any issue regarding Section 103.

The Court: Objection sustained. Let us proceed.

Mr. Brogan: Your Honor, it would be very helpful to me, and I think it is something to which I am entitled, if your Honor will delineate the basis on which you sustained the objection. In other words, I do not know what I am going to address myself to and what I am going to put into the record without knowing that.

The Court: This case is not going to degenerate into a forum for the analysis of the Court's reasons for making decisions and debating back and forth. You have objected, you have stated your position clearly, Mr. Howell has stated his position, you have both been heard at length. It is not necessary for me to assign reasons. Proceed with the next question, please.

Mr. Brogan: I say now, most respectfully to your Honor——

The Court: I will tell you my reasons. I think the question is improper; has no relation to the issue at bar. Now proceed, please.

Mr. Brogan: I did want to say for the record that I thought your Honor's remarks were unjust and unkind.

The Court: I am sorry. I did not mean to.

Mr. Brogan: This degenerating into something. I also wish to say to your Honor when I offer an exhibit, as I conceive to be my duty, you accept it or reject it for legal

reasons. You never accept it to avoid an argument, because I submit that pauperizes the value of that evidence when you admit it under any such reason, in the eyes of the jury, who feel it is trifling and of no account—"to avoid an argument, let's have it in." Your Honor, I think that is just a little rough on me.

The Court: Well, we are not doing that, so why do you bring up the issue?

Mr. Brogan: You have done it twice this afternoon.

The Court: Do you want to argue now about things that have occurred heretofore, or do you want to confine your argument to what is before the bar at the present time?

Mr. Brogan: You said it again when you said this thing is degenerating into something. I have no desire but a fair trial.

The Court: I didn't say the situation had degenerated. I said I didn't think it ought to. Let's proceed.

Mr. Brogan: I submit, sir, that is a distinction without a difference.

The Court: Has everybody been heard? Do you have anything further to say?

Mr. Brogan: Yes, I have. The question was disposed of on the evidential nature, but I want to read into the record what the witness' answer would be.

The Court: Not now you won't.

Mr. Fisch: How can counsel possibly do anything like that?

The Court: That is something I have never heard of, and you can furnish me with authorities after 4 o'clock.

Mr. Howell: Don't I understand that the practice here when the offer was going to be made, we were going to note on the record and outside of the presence of the jury we note it, and after 4 o'clock put it in?

The Court: Yes.

Mr. Howell: I thought I had misunderstood.

Mr. Brogan: You are not foreclosing me from that? I didn't intend to do it in the presence of the jury.

The Court: I will rule on that phase after 4 o'clock. Let us have a question, please.

Mr. Brogan: There is no question pending that I know of.

By Mr. Brogan:

Q. In your opinion, as an official in charge of operation, that is right, isn't it?

A. That is correct.

Q. Would it be possible for the defendant, Western Union, to comply with the State law which in specific terms prohibits the carrying of a wagering message, which is plainly a wagering message, and would such a law or attempted observance of such a law by Western Union disrupt the performance of that utility's public duty?

Mr. Fisch: I object to that.

The Court: State your ground.

Mr. Fisch: On the ground that the question is entirely improper, as it calls upon this witness to pass upon the question of whether or not the defendant company shall comply with the law of the State of New Jersey.

Mr. Brogan: Could—not shall.

Mr. Fisch: Or whether it could—even assuming that the question implies whether it could or could not. It is an improper question, if your Honor please.

The Court: I am not going to rule. I will hear you, Judge.

Mr. Brogan: I wanted to ask him one or two questions which might be helpful to the Court.

The Court: Are you going to withdraw the question?

Mr. Brogan: No, it may stand suspended.

The Court: Do you withdraw it? It cannot stand suspended.

(The question is repeated.)

The Court: The theory of the question seems to be that a corporation can be placed beyond the pale of the operation of law simply because it would disturb the internal affairs of the corporation, and because the corporation might run into difficulty with some Federal trade commission. That is as I observe it. I do not think that it is a proper question, and for that reason I will sustain the objection.

Mr. Brogan: I submit, sir, in your statement of what the

question was, I am sorry but I think you failed to comprehend it, because it was not correctly stated.

The Court: All right.

By Mr. Brogan:

Q. Are there other States throughout the United States which have statutes which prohibit the taking of wagering messages?

Mr. Fisch: I object to that, unless it can be shown that this witness is a lawyer and is familiar with the statutes.

The Court: I will permit you to cross examine now. Is there any objection?

Mr. Brogan: No, indeed.

By Mr. Fisch:

Q. Are you a member of the bar?

A. No, sir, I am not.

Q. Of any State of the United States?

A. No, sir.

Q. Are you familiar with the laws of the State of California? Yes or no?

A. No.

Q. Are you familiar with the laws of the State of Minnesota?

A. No.

Q. Are you familiar with the laws of the State of Kansas?

A. No.

Q. Are you familiar with the laws of the State of Mississippi?

A. No.

The Court: Let me ask a question which might save time.

By the Court:

Q. Have you examined the statutes of the several States of the United States?

A. Not I personally, but our law department has.

Q. Well, that information that you have was passed down to you by the law department?

A. Yes, we would get the information from the law department.

Mr. Fisch: I object.

The Court: Would his information, Judge Brogan, be based on hearsay or on actual knowledge? What do you say?

Mr. Brogan: No, it would be based on actual knowledge as to what is taken, for instance, in the State of Texas—what is taken, for instance, in the State of Montana.

The Court: How can the Prosecutor examine him on information he secured from somebody else? No, that is impossible. You may ask him if he understands the operation, if you like.

By Mr. Brogan:

Q. Do you know what messages are not taken, as a company regulation, in certain of the States?

Mr. Fisch: Of his own knowledge.

The Court: Every witness testifies of his own knowledge.

Q. Of your own knowledge?

A. Yes, I do, of my own knowledge.

Q. Are the number of States where certain messages are interdicted by statute listed in your tariff?

A. Yes, they are.

Q. Do you have a copy of that tariff?

A. Yes.

Q. Can you tell us the number of the States in which such messages are prohibited by law?

A. Yes, I can.

Q. And in which States, of course, the Western Union has no trouble?

Mr. Fisch: I object to that.

Q. Refuses to——

Mr. Fisch: I object.

Q. Well, doesn't send such messages as are interdicted?

Mr. Fisch: I am objecting and counsel persists in asking questions.

The Court: Counsel doesn't give the Court a chance to rule. Strike out all the questions. Pose your next question. What happened with the question you asked and the Prosecutor cross examined on? Did you abandon that question?

Mr. Brogan: You ruled it was not a good question, as I understood it.

The Court: All right, proceed.

By Mr. Brogan:

Q. Will you produce the tariff sheet of Western Union which shows the States and the number in which wagering messages may not be transmitted over their lines?

A. Yes, I can.

Q. Is this it?

(Witness is shown paper.)

A. Yes, this is it.

Q. What is the effective date of that?

A. The effective date of this is March 21, 1949.

Q. And this is part of your tariff book on regulations?

A. Yes, it is.

Q. And will you tell us in what States wagering messages are not taken by your company?

Mr. Fisch: I object to that, your Honor please, on the ground that the witness, in answer to that question, has been called upon to refer to, and has before him some regulations, which are apparently regulations framed by the company itself, which have a certain effective date, and which do not, so far as the testimony shows, cover the period mentioned in this indictment, for one; and secondly, on the ground that irrespective of what the regulations of the company may be with reference to this subject, they would not excuse the company from a violation of the laws of the State of New Jersey.

Mr. Howell: Mr. Fisch made his objection without the appreciation of the fact that is here involved. He overlooks the question before, which said that this is a tariff, and being such, it is a regulation of the Federal Com-

munications Commission, and has the same binding effect.

Mr. Fisch: May I answer that, so there may be no misunderstanding about it?

The Court: Let Mr. Howell finish. You say, Mr. Howell, that this tariff is a regulation of the Federal Communications Commission?

Mr. Howell: I say this: that that tariff, once it is approved by the Federal Communications Commission, has the same binding effect on Western Union as any statute of the Federal Government, or any statute of the State of New Jersey. And we are prepared to submit proof on that, if there can be any doubt about it.

Mr. Brogan: I have here an exemplified copy.

Mr. Howell: So the inference that this was a regulation of the company is the one I want to disabuse.

The Court: Didn't the company prepare this tariff and send it to the Federal Communications Commission, or do you claim that the Federal Communications Commission prepared the tariff?

Mr. Howell: Which one prepared it under the Federal Act, is unimportant.

The Court: Who do you say prepared it?

Mr. Howell: I don't know. I assume like every operation of every common carrier this is a joint product of the company and the staff—the regulating body. In any event, once it is filed under the Federal Act, it has the same force and effect as if they had dictated every word of it after the expiration of the period of protest.

The Court: My difficulty is when I ask a question to clarify an issue, I am met with an answer that it is a hypothetical situation.

Mr. Howell: I didn't meet you with that, Judge.

The Court: I have been met with it.

Mr. Howell: Not by me.

The Court: You stated that in the early days of this trial.

Mr. Howell: I don't want to be blamed that far back.

The Court: Is it contended that the Federal Communications Commission can give the Western Union the right to send messages in violation of a State law?

Mr. Brogan: Certainly not.

The Court: What do you say, Mr. Howell?

Mr. Howell: Certainly not.

The Court: Let me ask this question:

Is there anything contained in this tariff that would warrant Western Union in violating a State law?

Mr. Howell: There is no violation by compliance with the tariff of either the tariff or the State law.

The Court: Repeat the question, please.

(The question by the Court is repeated by the stenographer.)

Mr. Howell: I have the question. Now, what the Court wanted me to answer is the very issue in this case, and that is whether those two acts have to be interpreted by the Court and each kept in their respective place.

Mr. Brogan: If I have the right to say so, I say the Court's question is utterly irrelevant.

The Court: All right, I will not pursue it.

Mr. Howell: I want to put on the record that the fallacy of the Court's question revolved around the use of and the inference from the word "violation," and it doesn't respect the position which the State law and the Federal law must bear in relation to each other.

The Court: Let's proceed.

Mr. Fisch: May I be heard?

The Court: Yes.

Mr. Fisch: There have been prolonged statements by counsel in reference to this tariff, by which counsel have attempted to enlighten the Court, and let me say it is my understanding that this so-called tariff, which is nothing more or less than rules and regulations which are prepared by the Western Union Telegraph Company themselves, is merely filed with the Federal Communications Commission, and that the Federal Communications Commission does not give its stamp of approval to those regulations, or so-called tariffs, nor does it disprove them, but that they are merely filed, under the law, and that the Federal Communications Commission does not pass on any of those so-called tariff regulations unless and until a question arises as to their reasonableness, and then, and only then,

does the Federal Communications Commission, as I understand it, pass upon the reasonableness or unreasonableness of a particular regulation in that tariff, so-called.

The Court: Now I have heard enough.

Mr. Howell: The Court said he heard enough, but may I say——

The Court: You have your statement on the record, and he has his statement.

Mr. Howell: He has been quoting wrongly the statute of the United States, which the Court takes judicial notice of, and that is the statute on telegrams.

The Court: All right, I will come to that at later season.

By Mr. Brogan:

Q. I want to ask you if as a matter of your own personal knowledge, the defendant Western Union takes money orders for the purpose of placing wagers in the following states: Alabama——

Mr. Fisch: If your Honor please, I don't like to interrupt counsel.

Mr. Brogan: I noticed that.

Mr. Fisch: But the purpose——

The Court: We will recess for the day until tomorrow morning at ten o'clock.

(The Court leaves the bench and the jury retires.)

(The Court returns to the bench.)

The Court: In answer to the inquiry posed thusly, how many employees does the Western Union have in the United States, Judge Brogan through Mr. Weintraub wishes to state now for the record, in the absence of the jury, that the Western Union would have a certain number of employees. State the number.

Mr. Weintraub: The offer is to prove that in the years 1948, 1949, and 1950 the following number of employes, exclusive of messengers, and the following number of agents, were concerned with the handling of messages in the United States: For the year 1948, the number of employes 38,341, the number of agents for that year 26,876. For the year

1949, the number of employes, exclusive of messengers, was 31,910; the number of agents 26,263. The year 1950, the number of employes, exclusive of messengers, was 31,040, and the number of agents, 25,646.

The Court: Now, then, as to the query proposed by Judge Brogan as to how many employes there were in the State of New Jersey in the year 1950, in the absence of the jury Judge Brogan, through Mr. Weintraub, states thusly.

Mr. Weintraub: Our offer is to prove that in the year 1950 the number of employes, exclusive of messengers, and the number of agents of Western Union who were concerned with the handling of messages in the State of New Jersey were, as follows: The number of employes, 875, the number of agents 500.

We further offer to prove that for the years 1948 and 1949 the precise statistical information is not available but, as a matter of probability, the number is approximately the same as for the year 1950.

The Court: I do not know whether I stated originally the ruling on the question that I considered the situation was too remote but, in any event, let it now be stated that I conceive it would be evidential to put in the record the number of employes at the Bridgeton office, the number of employes at the Passaic office; and what the number of employes are at the Philadelphia office is immaterial, because, according to Mr. Semingsen, vice president in charge of operations, they do not read the messages in Philadelphia, and then relate against that the number of messages going from Bridgeton to Passaic or vice versa during a given period of time, and the number of employes stated.

Mr. Weintraub: Unless the record indicates we have failed that dual purpose, may I state in one brief sentence that this application has two objections. One, it relates to the claim that the corporate defendant, Western Union, shall be chargeable with the knowledge of the 9,000 messages that were carried in Bridgeton.

Mr. Fisch: In what period?

Mr. Weintraub: Whatever the period of your proof is, I don't care, a six-month period.

Mr. Fisch: From November 1949, your Honor, to sometime in April, 1950.

Mr. Weintraub: Whatever it may be. In connection with that, the jury is certainly entitled to know that this company handles the tremendous volume which we have, and has the tremendous number of employes handling the messages.

Certainly those facts are pertinent on the question whether the jury should infer that the corporate defendant knew about 9,000 messages.

The second purpose of the offer is part of our separate defense of the burden on interstate commerce, for the purpose of showing that if these many employes who handle messages are chargeable with the duty implicit in the Court's ruling on the motion for judgment; to wit, to read the messages and to become acquainted with the content and to ascertain whether those messages would themselves constitute violation of any criminal code, provision or other law relating to illegality, or whether they might aid the sender and addressee to accomplish a violation of law, which principle is absolutely implicit in the application of the disorderly house concept, it meaning, as the Court indicated on the motion, that any place where there is habitual violations of the law is a disorderly house.

The Court: This was restricted.

Mr. Weintraub: I have replied.

The Court: Everybody has had a bite out of this apple about four times, and I am not going to burden the record with any more arguments.

What is the next point?

Mr. Weintraub: In connection with the hypothetical question to which the Court sustained an objection, we state for the record, in the absence of the jury, that our offer is to prove the following: That the imposition upon the employes and agents of the company here in the State of New Jersey with respect to messages in interstate commerce, of becoming acquainted with the content of the messages for the purpose of determining whether there would be or may be violations of the laws set forth in the hypothetical question, would completely frustrate the service rendered by

Western Union and destroy the element of speed, which is the essential element of the service.

We further offer to prove that if each of the forty-eight states of the United States applied the same concept of a disorderly house with the implicit duty to examine and determine the illegality of messages, that imposition of such a duty would wholly and completely prevent the Western Union from discharging its duties.

There are five reasons why that result would follow.

First, it would be impossible to find employes with the necessary legal knowledge, capacity and talent to know all of the laws of any state relating to criminal activities and relating to unlawful activities——

The Court: Let me interrupt you to ask you a question.

Mr. Weintraub: Yes, sir.

The Court: Would the fact that this difficulty to read the messages throw a cloak of immunity over the actions of the Western Union? If you don't want to answer it, say "No."

Mr. Weintraub: I would be happy to answer it, but let me answer it in my own way.

The Court: Yes.

Mr. Weintraub: There is no question about the police power of the State. The State can enact laws which may approach interstate commerce. It can provide that anyone who shall send a message of a certain kind, to send to jail the person who sends it. No quarrel about that. It can even on the other end say, "Anyone who has received in interstate commerce bad beef may not sell it," no quarrel about that.

What is involved here is entirely different. The question is whether the State, as a matter of the exercise of its police power, can put upon a public utility a duty of policing, censoring all of the messages which it carries, to the end that other people may not violate the law, that is the crux of it.

Mr. Fisch: They do in other states, don't they?

Mr. Weintraub: No, sir. No state does it.

Laughter is no answer to me, Mr. Fisch.

The Court: I want to tell all of you, I don't want any

impertinence in this courtroom, starting tomorrow morning after ten o'clock, like we had today.

Mr. Weintraub: I submit, sir, that the Prosecutor ought to confine himself to the same standard.

The Court: Let me make a statement. Is it your position that in twenty states they can't take wagering messages?

Mr. Brogan: Five.

Mr. Weintraub: There are five on wagering messages, and twenty which deal with money orders.

The Court: Do you say that in those states you don't take wagering messages and you are able to supervise the sending and delivering, do you say that?

Mr. Weintraub: Yes. If your Honor will hear me, you will hear the difference of the disorderly house in that——

The Court: I want to know why you can do it in twenty?

Mr. Weintraub: We will do it in New Jersey, if you give us the statute. Today we are here on a charge by the State that the messages relate to making bets or making book. Tomorrow the State may say, "Six messages were sent out of your office referring to the purchase of heroin," and that is a violation under the law. The next day we can be brought in for taking money under false pretenses.

The Court: He doesn't have the Federal Code and the Statutes Annotated, but the ignorance of the law as to the individual has nothing to do with it.

Mr. Weintraub: Ignorance of the law has nothing to do with it. Can the State say, "We will take this common carrier and press them into service and make them a censorship agency to pass on all messages," when that function would destroy the public utility? That, we say, is beyond the power of any state.

The Court: I will tell you what I conceive the law of the State of New Jersey to be. If I am wrong you will have an adequate opportunity to show me where I am wrong, and I am amenable to changing my mind.

I conceive, and this is being said in the absence of the jury, that any franchise given to the defendant corporation; to wit, the Western Union corporation, by the Federal Communications Commission does not cloak that corporation

with immunity as to the operation of the state law. That, I think, is the issue. Don't argue with me now, but present me with cases to the contrary.

Let Mr. Weintraub finish.

Mr. Weintraub: The Court's concept of the issue being whether the Federal Government can immunize us from the state law, is not the issue. The question is whether the state law of a kind may be saddled upon a Federal interstate communication operation without impeding the performance of that interstate operation.

The Court: Say it any way you want to, the net result is the same. Can you hide under the franchise or can't you?

Mr. Weintraub: We are not hiding under any franchise. It is the power of Congress under interstate commerce that we are relying upon, and not hiding under anything. Let me give you an illustration.

The Court: No, please don't.

Mr. Fisch: I wish we could get through.

The Court: State the other things you want to offer. I am going to restrict you to put on the record what your proffers of proof is.

Mr. Weintraub: Tomorrow morning I will add the other statement.

Read to me what I said about the reasons.

(The stenographer reads, as follows: "First, it would be impossible to find employes with the necessary legal knowledge, capacity and talent to know all of the laws of any state relating to criminal activities and relating to unlawful activities——")

Mr. Weintraub: ——or who have the mental talent to pass judgment upon the questions whether the message could so aid or assist the sender or the addressee. It would be impossible to educate and train employes to enable them to perform that function.

Two, in the second place, if we could find persons of that mental capacity, they would be people of such education, training and talent that their wage level would become prohibitive and in all probability would so increase the cost of

telegraphic service to the public that it would come to a point beyond the reach of the public.

Moreover, if we could find sufficient people of such education and ability to replace our regular employes and agents, the time consumed in performing the function we are talking about would be so great as to multiply the number of employes and agents needed to handle the present message load, and the function would multiply to a point which could not even be estimated.

The third consideration is, that the time consumed in censoring and analyzing messages and considering them in the light of the entire criminal law and all of the rules of law relating to unlawful activities, in itself would destroy the element of speed and render Western Union service practically valueless to the public. It would involve not only time consuming consideration by employes, referring to the statutes, analysis of statutes, reference to case law, but would also involve the transmission of many messages to the law department at the home office of the company, for opinion.

The fourth consideration is, that if Western Union undertook to perform the function which we have described, Western Union would be plagued with countless lawsuits with respect to their decision concerning messages. On the one hand Western Union would be faced with civil suits for damages, as well as with the possibility of criminal complaints by reason of the refusal of service to persons whose messages were refused.

On the other hand, Western Union would be subject to criminal complaints by law enforcement authorities with respect to messages which Western Union employes might determine to be outside of any legal prohibition.

The fifth consideration is that if a duty or function of that character were imposed upon the employes and agents of Western Union, and if such employes or agents would reach an erroneous judgment they would be subject to the hazard of criminal prosecution, then whether the prosecution ultimately turns out to be ill-founded or well-founded, no person would want to take employment with Western Union. The occupation would become entirely too hazard-

ous. The employes and agents would be subject to potential criminal liability in an area and to a degree which would be unique in all industry.

The Court: The court will adjourn.

(The trial is adjourned at 4:20 P. M., until tomorrow morning, Thursday, October 18, 1951, at 10:00 A. M.)

• • • • • •

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 315

WESTERN UNION TELEGRAPH COMPANY AND CHARLES H. FRAKE,

Appellants,

vs.

STATE OF NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

THEODORE D. PARSONS,
Attorney General of New Jersey,

JOSEPH A. MURPHY,
Assistant Deputy Attorney General of New Jersey.

Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 315

WESTERN UNION TELEGRAPH COMPANY AND CHARLES H. FRAKE,

Appellants,

vs.

STATE OF NEW JERSEY

Appellee

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellee asserts that the statutory provision, Title 28, U. S. Code, Section 1257(2), relied upon by the appellant, does not sustain the jurisdiction of the Court; the unsubstantial character of the grounds stated by appellant and the lack of substance in the questions raised by this attempted appeal are so apparent on the face of the record as to warrant the Court to summarily dispose of this attempted appeal at this time.

Nature of the Case

Appellants, The Western Union Telegraph Company and Charles H. Frake (manager of its office at Bridgeton, New

Jersey) were indicted and convicted in the Cumberland County Court, State of New Jersey, after a jury trial, of operating a common-law disorderly house (Appendix A). The indictment arose out of the sending by the appellants of messages from the office of Western Union in Bridgeton, New Jersey, to one Donaldson in Passaic County, New Jersey, and to C. J. Rich & Company in Illinois, and the payment in Bridgeton, New Jersey, of money wired there by Donaldson and Rich & Company. The messages out of Bridgeton related to wagers on horse races and the money orders transmitted sums of money to the addresses for that purpose. The money orders back to Bridgeton represented the winnings less the telegraphic charges made. The State proceeded upon the theory that a disorderly house was proved by showing the defendants habitually received and transmitted at the Bridgeton office bets on horse races through the medium of telegraphic money orders and messages and payment at said office of the winnings on the bets less telegraphic charges. There was no attempted disguise or pretext. The import of the transaction was fully within the knowledge of the defendants, who consciously and with full awareness not only transmitted the messages but also aided and materially assisted in the composition and direction of them so that the wagers could be successfully consummated. All the messages in the case on their face clearly were gambling messages, horse race bets, and nothing more. The evidence adduced by the State at the trial showed that betting was habitually carried on with the conscious participation of Western Union in the illegal transactions and its facilities were employed in large-scale gaming business which was financially profitable. The appellants concede that the statements of fact contained in the opinion of the Supreme Court of New Jersey (12 N. J. 468 Adv. Sheets July 27, 1953; 97 Atl. Rep. (2) 480), are warranted by the evidence in the record at the trial.

Statute Involved

The statute, Title 2, Chapter 103, Section 1 of the Revised Statutes of New Jersey (R. S. 2:103-1) provides as follows:

> "*Offenses indictable at common law and not otherwise covered, punishable as misdemeanors.* Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not expressly provided for by statute, shall be misdemeanors."

I. Matters and Grounds Making Against Jurisdiction

The appellant, Western Union, argued that the application of the concept of a common law disorderly house to it would deny it due process of law and constitute an interference with Interstate Commerce in violation of the Constitution of the United States. This amounts to a contention that the federal rights of Western Union prevent application of this concept to it. This argument does not challenge the validity of the state statute. An overruling of it amounts to a denial of the assertion of federal rights rather than a validation of the State statute. In fact the State court in its opinion indicates this to have been the case. In its opinion, 12 N. J. 468, at pages 479, 482 and 484, the State Supreme Court said:

> "The appellants argue that the concept of a disorderly house as applied in this case violates the Constitution of the State and of the United States (p. 479-480)."
>
> "As to the application of the concept of disorderly house violating the Commerce Clause of the United States Constitution * * *." (p. 482).
>
> "It is also contended that the standard employed by the trial court was so vague and uninformative as to be a denial of due process of law * * *." (p. 484).

The State Supreme Court in its opinion did not pass upon the validity of the statute (R. S. 2:103-1); the argument of appellants does not impugn its validity, they do not challenge the statute, rather do they claim that the concept of common law disorderly house under the statute cannot be applied to them as it would infringe their federal rights. Such objection is not a sufficient basis for appeal under 28 U. S. C. 1257(2). *Mergenthaler Linotype Company* v. *Davis, et al*, 251 U. S. 256, 259, 40 S. Ct. 133, 134.

The section of the statutes of New Jersey questioned on this attempted appeal (R. S. 2:103-1) was originally embodied in the first codification of the Crimes Act in this State, adopted March 18, 1796 (Pat. L. of N. J., p. 220, sec. 68) and has remained substantially unaltered up to the present time. The legal effect of this section was to leave the common law intact as to what acts constituted indictable offenses. *State* v. *Butterworth*, 104 N. J. Law 579, 581. This statute, in effect, continued or amounted to a continuation of the common law respecting indictable criminal offenses. Offenses of an indictable nature at common law, and not expressly provided for by statute, were continued under R. S. 2:103-1. Even without this express provision, such offenses would have continued to be indictable in this State in the absence of express statutory proscription. The contention of appellants is not addressed to the validity of this statute but rather to the applicability of a particular concept permitted under it, upon the ground that appellants' federal rights prevent application of this concept to them.

II. No Substantial Federal Question Is Presented by the Attempted Appeal

The presence of a substantial Federal question is essential to invoke the jurisdiction of this Court. If the questions

presented are plainly unsubstantial, jurisdiction is not taken.

Levering & Garrigues Co. v. Morrin, 289 U. S. 103, 105, 53 S. Ct. 549, 550.

A claim of unconstitutionality is unsubstantial where (a) it is obviously without merit, or (b) its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.

Ex parte Paresky, 290 U. S. 30, 32, 54 S. Ct. 3, 4.
Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, 105, 53 S. Ct. 549, 550.

A. As to Due Process

The appellants contend that the application of the common law disorderly house to them on the facts of this case denied due process; that the standard was too vague and uninformative; that appellants could not possibly know until the verdict of a jury is returned whether they were guilty of a crime or not; that there was no practical way the appellants could determine whether it was violating the law; that they had to take the messages.

The facts in this case show that the employees of Western Union were told by the bettors what they wanted to do, that is, bet on horse races, and the employees suggested and instructed them how to accomplish this purpose, how to word the messages, and even where to direct them. Appellants had full knowledge of the entire transactions and their import. In addition appellants had been specifically warned by the authorities of the illegality of their activities, but despite this admonition continued their practices (12 N. J. 485). The messages in this case on their face were gambling

messages, horse race bets, and nothing more. There was no attempt at disguise. The import of the transaction was fully within the knowledge of the appellants who aided and materially assisted in their composition and direction. (12 N. J. 482). Certainly the due process clause was not intended to give immunity or protection under these circumstances.

No one is compelled to contribute to or facilitate the operation of an unlawful business. Service without discrimination does not require Western Union to abet criminals or criminal enterprises. Western Union has a duty to refuse service for criminal purposes and was not forced to transmit horse race bets.

Andrews v. *Chesapeake & P. T. Co.*, 83 F. Supp 966, 968 (U. S. D. C. 1949).

Hamilton v. *Western Union*, 34 F. Supp. 928, 929 (U. S. D. C. Ohio, 1940).

B. As to Interstate Commerce

Appellants also contend that the application of the concept of disorderly house to them violates the Commerce Clause because it places an undue burden on interstate commerce.

There has been no interference with interstate commerce herein. Interstate commerce only deals with and involves legitimate subjects of commerce. Gambling transactions, horse race bets, are no more the subject of interstate commerce than is the lottery business. The objection addressed to interstate commerce is well answered in *McCarter* v. *Hudson County Water Co.*, 70 N. J. Equity 695 (E. & A 1905) aff'd. 209 U. S. 349, 28 S. Ct. 529 (1908). In that case a statute of New Jersey making it unlawful for any person to transport through pipes and conduits the water of any fresh water lake of this State into any other State was

under attack. The argument was made that it interfered with interstate commerce. The court passed upon the commerce clause objection as follows (70 N. J. Equity at p. 719):

> "This is not in violation of the interstate commerce clause of the federal constitution because until the water is lawfully abstracted it does not become the subject of legitimate commerce. *Ames* v. *Kirby*, 71 N. J. Law (42 Vr.) 442. The state having power to prohibit the diversion of water from the lakes and streams for transportation beyond the state, the prohibition is a condition imposed upon its diversion, and so the water diverted cannot ligitimately enter into interstate commerce. *Geer* v. *Connecticut*, 161 U. S. 519, 530."

Horse race bets are illegal and unlawful in New Jersey and cannot become the subject of legimate interstate commerce. Consequently interstate commerce is in no way affected or involved (12 N. J. 483).

In the case of *Ames* v. *Kirby*, 71 N. J. Law 442, horse race bet messages and money orders were received at the Atlantic City, New Jersey office of a telegraph company which transmitted said messages and money orders by telegraph to a corporation in West Virginia. The defendant, Ames, acting for the telegraph company at its office in Atlantic City, New Jersey, received and transmitted the messages and money orders whereby bets were made on horse races in West Virginia. The defendant contended there was a violation of the Commerce Clause of the United States Constitution. The court disposed of this objection on page 446:

> "In the case before us the so-called commerce has no existence except such as may arise through an infraction of the local law against gambling. Traffic that has such an origin cannot be legitimate interstate commerce. The local prohibition attaches before any commerce commences."

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This case also cites *Coe* v. *Erral*, 116 U. S. 517; *Kidd* v. *Pearson*, 128 U. S. 1; and *Geer* v. *Connecticut*, 161 U. S. 519.

The interstate commerce clause of the Federal Constitution is not violated. The so-called commerce in bet messages and money orders on horse races is not a proper subject of interstate commerce. Nor are there any regulations of the Federal Communications Commission which would require Western Union to accept or transmit wager messages or wager money orders in the State of New Jersey (12 N. J. 484).

It is respectfully submitted that the constitutional questions urged by the appellants are without merit and have been so plainly foreclosed by the decisions as to leave no room for real controversy, and the appeal, if the judgment of the court below is not affirmed, should be dismissed for want of a substantial Federal question.

Zucht v. *King*, 260 U. S. 174, 176.
McArthur v. *U. S.*, 315 U. S. 787.

Motion to Dismiss or Affirm

Appellee, the State of New Jersey, respectfully moves that the within appeal be dismissed or, in the alternative, that the judgment of the Supreme Court of the State of New Jersey be affirmed.

THEODORE D. PARSONS,
Attorney General of New Jersey,
JOSEPH A. MURPHY,
Assistant Deputy Attorney General of New Jersey,
Counsel for Appellee,
State House Annex,
Trenton, New Jersey.

APPENDIX "A"

Indictment No. 5012

Indictment for Maintaining a Disorderly House

(Filed June 5, 1950)

The Grand Jurors of the State of New Jersey, for the County of Cumberland, upon their oaths present that

The Western Union Telegraph Company and Charles H. Frake, on the twenty-second day of June, in the year of our Lord, one thousand nine hundred and forty-eight and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the City of Bridgeton, in the County of Cumberland aforesaid, and within the jurisdiction of this Court, wilfully, knowingly and unlawfully did keep and maintain at the premises commonly known and designated as 82 East Commerce Street, a certain common ill-governed and disorderly house; and in the said house, for their own lucre and gain, certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and on the said other days and times there unlawfully and willingly did cause and procure to frequent and come together, and the said men and women, in the said house of them, The Western Union Telegraph Company and Charles H. Frake, at unlawful times in the day, then and on said other days, and times, there to be and remain, betting, bookmaking and gambling, and misbehaving themselves, and unlawfully and willfully did permit and yet do permit, to the great damage and common nuisance of all the citizens of the State of New Jersey, there inhabiting, being, residing, and passing, to the evil example of all others in the like case offending, contrary to the form of the revised statute 2:103:1, and against the peace of this State, the government and dignity of the same.

(S) NELSON F. STAMLER,
Deputy Attorney General of New Jersey.
(S) GEORGE H. STANGER,
Cumberland County Prosecutor.

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ORDER AMENDING INDICTMENT

Upon consideration of the motion of the prosecuting attorney for permission to amend the idictment in the cause in matter of form, and after hearing Theodore D. Parsons, Esq., Attorney General of New Jersey, by Simon L. Fisch, Esq., Deputy Attorney General, in support of the motion, and Robert L. Howell, Esq., attorney for the defendants, in behalf of the defendants, and upon consideration thereof,

It is ordered on this 12th day of March, 1951, that the motion be and the same hereby is granted; and the indictment is hereby amended in the following respect, to wit: In each and every place wherein the words "The Western Union Telegraph Company" appear, insert immediately thereafter the words "a corporation."

(S) DAVID L. HORUVITZ,
Judge.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 315

THE WESTERN UNION TELEGRAPH COMPANY and CHARLES H. FRAKE,

Appellants,

—vs.—

STATE OF NEW JERSEY,

Appellee.

OPPOSITION OF APPELLANTS TO MOTION TO DISMISS OR AFFIRM AND THEIR COMMENTS ON THE STATEMENT OF APPELLEE OPPOSING JURISDICTION

JOHN H. WATERS
WILLIAM G. H. ACHESON
Counsel for Appellants
60 Hudson Street
New York 13, New York

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IN THE

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THE WESTERN UNION TELEGRAPH COMPANY and CHARLES H. FRAKE,

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STATE OF NEW JERSEY,

Appellee.

OPPOSITION OF APPELLANTS TO MOTION TO DISMISS OR AFFIRM AND THEIR COMMENTS ON THE STATEMENT OF APPELLEE OPPOSING JURISDICTION

In opposition to the *pro forma* Motion to Dismiss or Affirm, appellants contend that appellee in its statement opposing jurisdiction raises no substantial matters or grounds making against jurisdiction. Appellants in opposition to the motion beg leave to incorporate by reference the contents of their Statement as to Jurisdiction.

In the statement of appellee opposing jurisdiction the following cases:

Mergenthaler Linotype Company v. *Davis,* 251 U. S. 256, 259;

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, 105;
Ex Parte Poresky, 290 U. S. 30, 32;
Zucht v. *King*, 260 U. S. 174, 176;
McArthur v. *United States*, 315 U. S. 787,

are cited as holding that an appeal taken of right will be dismissed or affirmed if no federal question, or no substantial federal question, is raised. With this appellants have no quarrel. The criteria outlined in particular in the *Levering* case are that the federal question raised (1) "may be plainly unsubstantial either because obviously without merit" or (2) "because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy".

No demonstration is made in the statement of appellee opposing jurisdiction that either criterion is applicable. Certainly, appellants have shown in their Statement as to Jurisdiction that the questions are substantial; and appellee does not purport to cite any prior decision of this court even touching upon the questions raised, let alone concluding them. Certainly the decisions of this court cited by appellee (other than those on procedural points mentioned above) are not even close to the questions here raised; *Geer* v. *Connecticut*, 161 U. S. 519 upholds a statute forbidding the killing of "any woodcock, ruffled grouse or quail for the purpose of conveying the same beyond the limits of this State"; *Kidd* v. *Pearson*, 128 U. S. 1 upholds the Kansas Prohibition Statute in-

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cluding the provision forbidding manufacture or sale for export from the state; *Coe* v. *Errol,* 116 U. S. 517 allows New Hampshire to levy a non-discriminatory tax upon logs cut in that state while *in situ* though intended for export to Maine; and *Hudson Water Co.* v. *McCarter,* 209 U. S. 349 upholds a New Jersey statute prohibiting the transportation of water of that state into any other state. In the *McCarter* case in this court the decision of Judge Holmes is far less extensive than the decision of the New Jersey courts (for which appellee cites the decision), and we submit that the holding in the case in this court has no aplication whatsoever to the instant case. While more appropriate for discussion when the appeal is heard on the merits, a few words of preliminary comment on the New Jersey case of *Ames* v. *Kirby,* 71 N. J. Law 442 are in order: In the first place it involves a different statute from that on which this indictment No. 5012 under review was founded, namely, that now contained in R.S. 2:135-3 on which was based another indictment not moved for trial but still pending, Indictment No. 5013; furthermore, it was the decision of a court of original, not appellate, jurisdiction and was not on the merits but on decision of a petition for habeas corpus.

Perhaps appellee cites the *Mergenthaler* case (decided January 5, 1920) for the statement in its concluding sentence that the question sought to be raised on writ of error "might afford basis for certiorari but constitutes no ground for writ of error from this court." If so, appellee overlooks the fact that that decision antedates the 1925 rewriting by the Congress of Section 237 of the Judicial Code (43 Stat. 937) which *inter alia* added sub-

division (c) thereof (28 U. S. C., 1940 ed., s. 344). This is the provision now contained in 28 U. S. C. s. 2103, which requires this court, where a party has mischosen appeal rather than certiorari, to treat the papers on appeal as a petition for writ of certiorari.

Appellants believe they have correctly chosen appeal. However, if for any reason it should be the view of the court that appellants have mischosen the appellate avenue, appellants beg leave to have the court consider their 3rd and 4th assignments of errors and prayer for reversal (copy attached hereto as Appendix A) together with their appeal papers as a petition for certiorari.

New York, New York,
September 4th, 1953.

Respectfully submitted,

JOHN H. WATERS
WILLIAM G. H. ACHESON
Counsel for Appellants.

APPENDIX A

Assignment of Errors and Prayer for Reversal

[Same Caption]

The Western Union Telegraph Company and Charles H. Frake, appellants herein, and each of them, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which each will rely in the prosecution of said appeal from the final judgment of the Supreme Court of New Jersey entered on June 1, 1953.

The Supreme Court of New Jersey erred:

1. In holding valid R.S. 2:103-1 and the indictment of defendants thereon and the judgments of conviction thereon, against the claim of its being repugnant to the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.

2. In holding valid R.S. 2:103-1 and the indictment of defendants thereon and the judgments of conviction thereon, against the claim of its being repugnant to the Commerce clause, Article 1, Section 8, Clause 3, of the Constitution of the United States as a burden on interstate commerce.

3. In applying the concept of the common law disorderly house under New Jersey law against the Telegraph Company and against its manager at the Bridgeton, New Jersey, office, upon the ground of repugnance to the Due Process clause of the Fourteenth Amendment to the Con-

stitution of the United States because such concept is so vague as to be void for the reason that the concept embraces the gamut of acts declared unlawful, both statutory and at common law, whether criminally or civilly.

4. In applying the concept of the common law disorderly house under New Jersey law against the Telegraph Company and against its manager at the Bridgeton, New Jersey, office, upon the ground of repugnance to the Commerce Clause, Article 1, Section 8, Clause 3, of the Constitution of the United States as a burden on interstate commerce because such concept is so vague as to be void for the reason that the concept embraces the gamut of acts declared unlawful, both statutory and at common law, whether criminally or civilly.

WHEREFORE, appellants, The Western Union Telegraph Company and Charles H. Frake, pray that the final order and judgment of the Supreme Court of New Jersey be reversed, and for such other relief as the Court may deem fit and proper.

Dated: New York, N. Y.
July 24th, 1953.

Respectfully submitted,

/s/ JOHN H. WATERS
JOHN H. WATERS

/s/ WM. G. H. ACHESON
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No. 315. WESTERN UNION TELEGRAPH CO. ET AL. *v.* NEW JERSEY. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. MR. JUSTICE BLACK and MR. JUSTICE REED are of the opinion that probable jurisdiction should be noted. *John H. Waters* and *William G. H. Acheson* for appellants. *Theodore D. Parsons*, Attorney General of New Jersey, and *Joseph A. Murphy*, Assistant Attorney General, for appellee. Reported below: 12 N. J. 468, 97 A. 2d 480.